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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ARCH A. MOORE, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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I

QUESTIONS PRESENTED

1. Wether defense counsel's representation to the court that "Where I was at fault is I substituted my judgment of the government's evidence for my client's evidence.", denies the defendant effective assistance of counsel under the Sixth Amendment to the U. S. Constitution.

2. Whether admitted actions of defense counsel are ineffective where counsel coerces defendant to plead guilty, where defendant has protested to his counsel his innocence, has protested his innocence to the United States Attorney's in meetings with them before arraignment; defendant's noticeable hesitation to plead at arraignment; where defense counsel admits to coaching the defendant in his plea responses, denies the defendant effective counsel under the Sixth Amendment.

3. Whether the admitted failure of defense counsel to inquire of defendant concerning defendant's defense of the case; and failure to interview a single witness; denies the defendant effective counsel under the Sixth Amendment

.4. Whether the admitted misadvice by defense counsel as to length of incarceration, before the plea agreement signed, or at any time, denies defendant effective assistance of counsel under the Sixth Amendment.

5. Whether the misadvice of defense counsel as civil liability, before Plea Agreement signed, denies defendant effective assistance of counsel under the Sixth Amendment.

6. Whether admitted misadvice by defense counsel, that defendant could withdraw his guilty plea any time before sentencing, when defense counsel admits he goofed, and was not aware of the 1983 changes to Rule 11 requirements in thi

7. Whether the failure of defense counsel to submit defendant's own affidavit in support of defendant's Motion to Withdraw his Guilty Plea denied the defendant his right to effectiveness of counsel under the Sixth Amendment to the U. S. Constitutio

8. Whether failure of defense counsel to protest the submitting of a Memorandum of Sentencing by the U. S. Attorney unilaterally to the court, which the courts found when the U. S. Attorney promised to take no position at sentencing, was improper, denied the defendant his rights to effective counsel under Sixth Amendment of U. S. Constitution.

9. Whether admitted failure of defense counsel to brief the defendant on the parole commission guidelines on old law counts, denied the defendant of the right to effective assistance of counsel under the Sixth Amendment to the U. S. Constitution.

10. Whether violations by the actions of defense counsel of DR7-l04 (A)(l) Code of Professional Responsibility, Rules of Professional Conduct of The American Bar Association; and Rule 3.7 of the West Virginia State Bar Rules of Professional Conduct, denied the defendant of his rights under the Sixth Amendment of the U. S. Constitution where said counsel refused to withdraw.

11. Whether the admitted failure of defense counsel in failing to submit defendant's version of the case to the Probation Officer before the Probation Officer constructed the Pre-Sentencing Investigation Report, where defense counsel, in open Court, on the record, commits himself to make such submission. However, defense counsel fails to do the same, and, therefore, the presentence investigation remains naked of any defendant's comments or version of the case. Does this conduct deny the defendant of his rights under the Sixth Amendment to the U. S. Constitution?

12. Whether the actions of defense counsel in failing to object to the level of fines ordered to be paid by the Court, when said fines exceeded the statutory authority of the Court, denied the defendant his rights to effective counsel under the Sixth Amendment to the U. S. Constitution.

13. Whether Rule ll, standing alone cures the admitted misadvice and ineffectiveness of defense counsel where

the totality of the defense counsel's actions are so grievously wrong, and clearly contrary to that required by the law, and the Sixth Amendment of the U. S. Constitution.

14. Whether the defendant has been denied his constitutional rights when every court, district and/or appellate, have judged and evaluated the defendant's abilities with respect to the defendant's case, rather than examining the effectiveness or ineffectiveness of defense counsel.

15. Whether defense counsel's admitted failure to advise the defendant of the consequences of his plea, denies the defendant effective assistance of counsel under the Sixth Amendment to the U. S. Constitution.

16. Whether the appellate court erred in failing to consider de novo matters presented on appeal, where there is in the record substantial uncontroverted support for the defendant's claim of ineffectiveness of counsel.

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Maldonaldo v. Winans
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Burgess v. Griffin
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Howard v. State
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Via v. Superintendent of Powhatan Correctional Center
643 f.2d 167 (Cali, VA 1981)

State v. Washington
491 So. 2d 1337 (LA 1986)

Woodward v. Collins
898 F.2d 1027 (Texas 1990)

United States v. Jamil
707 F.2d 638 (1983)

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668 F.2d 317 (7th CA)

U.S. v. Miller
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REFERENCES TO OPINIONS RENDERED BELOW

1. United States of America v. Arch A. Moore, Jr., No. 92-6419 (United States Court of Appeals, Fourth Circuit) unpublished opinion

2. Arch A. Moore, Jr., v. United States of America, No. 2:91-0797 (CR 2:90-00078)

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JURISDICTIONAL STATEMENT

Petitioner, Arch A. Moore, Jr., (hereinafter "Petitioner"), seeks this Honorable Court's review of an Order entered on May 26th, 1993, by the United States Court of Appeals for the Fourth Circuit (hereinafter the "Fourth Circuit"). See Appendix p. A-1. On June 24, 1993, the Fourth Circuit denied Petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc. This Court has jurisdiction to review said Order in question by a Writ of Certiorari pursuant to 28 U.S.C. 2101 (c).

STATEMENT OF THE CASE

This case arises from Petitioner's Motion to Vacate his Conviction and Sentence pursuant to 28 U.S.C. 2255, which was filed in the United States District Court for the Southern District of West Virginia (hereinafter the "District Court"). Subject matter of jurisdiction in the District Court was based upon 28 U.S.C. 2255. The basis upon which said Motion was filed was that my conviction (guilty plea) and sentence was imposed in violation of my rights under the Fifth and Sixth Amendments to the Constitution of the United States. Namely, I argued that I received ineffective assistance of counsel. My counsel at all relevant times was William G. Hundley (Hundley). On January 7, 1992, an evidentiary hearing was held before the District Court, the Honorable Richard L. Williams presiding, while I raised numerous issues of ineffectiveness. Said hearing was limited by the Court to four (4) issues. These issues were:

(1) Hundley's alleged misadvice regarding parole eligibility and time to be served; (2) Hundley's alleged misadvice regarding civil liability as a result of pleading guilty; (3) Hundley's alleged misadvice regarding the sentencing effects of pleading guilty to four (4) counts of a five (5) count indictment; and (4) Hundley's alleged misadvice regarding withdrawal of any guilty plea.

The district court made Findings of Fact and Conclusions of Law on these four issues, as well as, other issues contained in my 2255 Motion, which were not argued. The district court denied relief. I appealed to the fourth circuit; was afforded a hearing where the fourth circuit in an unpublished opinion, where the Court ultimately held that the district court's findings were not clearly wrong. Thus, the fourth circuit denied relief,

and also denied my suggestion for a rehearing and my suggestion for a Rehearing in Banc. The fourth circuit held: "We review the district court's findings of fact supporting its ruling for clear error. If the Court found any facts which might support a Sixth Amendment claim, we would review de novo its ultimate conclusion that the Sixth Amendment was not vio'ated." (Appendix A-3.)

I maintain that the fourth circuit was clearly wrong in not reviewing my claim de novo. I maintain that the circuit court's statement of "any fact supporting a Sixth Amendment claim", means any fact. I have evidence of at least twenty (20) unimpeachable facts, clearly supported by the record, that show I was denied effective representation by Hundley.

REASON FOR GRANTING THIS PETITION

A. The decision of the United States court of appeals denying relief, where Petitioner has shown numerous instances of uncontested acts or failure to act, of ineffective assistance of counsel, conflicting with decisions in all federal and state jurisdictions, including the fourth circuit itself.

B. The circuit court of appeals has clearly sanctioned the district courts absolute disregard for Petitioner's claims, in that Petitioner presented 20 issues of facts on failure to act, of ineffective assistance of counsel and the district court arbitrarily limited its evidentiary hearing to (4) issues and not the claims in totally refusing to review de novo. This is a departure from the accepted and usual course of judicial proceedings. Therefore, this Court should exercise its power of good conscience and supervision.

C. The circuit court and the district court have created in this decision a new standard in judging ineffective assistance claims "The sophisticated very intelligent standard". The courts have totally disregarded at least 20 legitimate 6th amendment ineffective counsel claims based on the fact they (the courts) say Petitioner is "highly intelligent", thereby establishing a new standard test in 2255 motions.

D. In today's society the legal profession is under savage attack, and the Courts can no longer be a safe haven for an ineffective attorney, to the prejudice of any defendant, much less the petitioner herein. This Court must exercise its powers on this

special and important reason.

E. Strickland v. Washington has constructed an extremely difficult barrier for any defendant, by presuming all attorneys acted reasonably; with this new standard "The sophisticated very intelligent standard", the defendants find the barrier insurmountable. The complications of new sentencing guidelines, and the demands of society to not give ineffective lawyers advantage, removal of the presumption of effectiveness is required, and "The sophisticated very intelligent standard" must be reversed. Courts can no longer be looked upon to protect the legal profession.

ARGUMENT AND STATEMENT OF FACTS

On November 29, 1990, William G. Hundley was retained to represent Arch A. Moore, Jr., your petitioner, a former three-term Governor, and a six-term member of the United States Congress, in matters being investigated by the United States Attorney's Office, Southern District of West Virginia. Hundley immediately informed the government of his representation of me, as the records in this case show.

From November 29, 1989 to April 11, 1990, Hundley met with me on three occasions. During this time-frame counsel billed me for 25 hours on the case, 15 of these hours occurred on January 10, 1990, at an interview the defendant had with Assistant U. S. Attorneys. Said interview was information gathering.

Not until late March, 1990, was I informed that I was a target. Hundley did not ever advise me he felt I would be indicted. On April 11th, 1990, Hundley arrived in Charleston, West Virginia to hear tape recording between petitioner and one, John Leaberry, an associate in defendant's law office. Said recordings were obtained at the direction of the U. S. Attorney's Office, and occurred on January 9, 1990, Even though Hundley had been counsel of record and was representing the defendant since November 29, 1989, the government circumvented the attorney-client relationship, and used an arm of the government to inquire about events directly associated with their investigation of defendant. U.S. v. Hammond, CA2 No. 87-1513, 5/2/88. U.S. v. Jamil, 707 F.2d 638 (1983).

The purpose of Hundley hearing said tapes was to inform Hundley that it was the government's position that Arch A. Moore, Jr. had obstructed justice, and that the government was

planning an indictment.

At 2:30 p.m., on April 11, 1990, Hundley, after hearing the tapes, met with me for the fourth time since November 29, 1989, and advised me that in his opinion the tapes were supportive of the government's claim of obstruction of justice. Hundley did not once investigate or attempt to develop any defenses, nor did he realize that the government may nave violated the attorney-client relationship See State v. Washington, 491 502nd 1337 (LA. 1986); Burgess v. Griffin, 585 F./Supp. 1564 (W.D.H.c. - 1984) and Maldonado v. Winans, 728 F.2nd 438 (CA-10 NM 1984).

I responded that I didn't believe I had obstructed justice, and I had not heard the tapes. However, Hundley was of the opinion that I had. I wanted him to return to the U. S. Attorney's office and determine what they wanted. Hundley left my office at approximately 3:00 p.m., and went to the U. S. Attorney's office. Hundley returned to my office at 4:00 p.m., and advised me that the government would not be satisfied with a guilty plea only to obstruction of justice, but insisted, since they had the defendant on obstruction of justice, they wanted a plea to four additional counts.

At this time Hundley laid before the me a proposed Plea Agreement listing five counts that the defendant would have to plead guilty to, or, the government stated they would request a broader indictment, including the RICO count.

I vehemently advised counsel that I was not guilty of the four additional counts, and was not sure of my guilt on the obstruction count, as I never heard the tapes which was supposedly the basis for said count, nor did I recall from my personal knowledge the exact conversation. (See affidavits of Hundley

which support the fact that I protested my innocence from the start) A-44, A-46, A-52, and A-54.

Hundley advised the defendant that he had never won a case in which electronic recording was involved. I was devastated. I had absolutely no knowledge that the U. S. Attorney was about to indict me. The only information that I had was that they were seeking information at this point in time. In fact, I had not received a target letter at all until very late March, 1990, ten to fifteen days before this event.

At this meeting on April 11, I listened to Hundley's representations, which were that I would spend six months incarcerated, that no restitution to be required, and simply that the first four counts were "throwaway counts" in the indictment. He stated that they were there merely to please various governmental agencies, and should not cause the defendant any concern. The defendant pointedly asked his counsel during this time what civil liability he would incur if he signed the Plea Agreement that counsel recommended that he sign. Counsel's response, however now incredible, was "none whatsoever".

The defendant pointedly asked his counsel about the six month incarceration, and counsel represented that the government agreed that sentence would be at the lowest end of the guideline; six months would be served.

Hundley, then, after meeting with me one-half hour after he became aware of the government's intentions, which meeting was the fourth in five months, without investigating any count which I was to plead, other than listening to a tape recording on Count Five; where Hundley did not pursue any investigation of the tape or consider any possible defense; did not talk to one

single witness of the defendant; where Hundley discussed these revelations for the first time with the me for one-half hour on April 11, 1990, Hundley then announced to the defendant that he should sign the Plea Agreement; Hundley signed the Plea Agreement; Hundley left said Plea Agreement with his signature on it; told me that I had to sign it by 12:00 noon on April 12, 1990, the next day, or the government would proceed to indict me, and not limit the indictment to the five counts listed in the Plea Agreement. Hundley then left my office and returned to Washington, D. C. All of these are uncontroverted facts which occurred one (1) hour after Hundley met with the government. These acts by Hundley are outside all reasonable conduct of effective representation. No investigation, and he recommends I plead guilty. Case law is clear where an attorney fails to investigate. See Via v. Superintendent, Powhatan Correctional Center, 643 F.2d 167 CA4 VA (1981); Woodward v. Collins, 898 F.2d 1027 (Texas 1990), and Hill v. Lockhart, 106 S. CT-366.

At this point I had absolutely no idea what was happening. I had eight hours, an extremely short period of time to decide. My attorney left town. I talked with family members by phone, and in person, and at 8:30 p.m., went to residence of Dr. A. Thomas McCoy, a urologist, and one of the my personal friends, to spend the night. I told Dr. McCoy my problem, and the fact that I would be incarcerated and separated from my family for six months, exactly what Hundley told me. Dr. McCoy, an unimpeachable, disinterested source confirms this by affidavit. (See McCoy affidavit at A-60.)

Defendant arrived at his office at 8:00 a.m. on April 12, 1990, still undecided as to whether to sign the Plea Agreement.

At 11:45 a.m., fifteen minutes before the deadline, I called Hundley, and stated that even though I was innocent of matters set forth in the Plea Agreement, particularly the areas of mail fraud, extortion and two areas of false filing of income tax returns, and not sure of my liability under the obstruction of justice claim; I felt compelled to trust the advice of Hundley, and thus I caved in to the overwhelming amount of pressure which was put on me by the government, and by Hundley. Therefore, based upon Hundley's advice, of six months incarceration only; no restitution, and no civil liability whatsoever, I signed the Plea Agreement.

During the period from April 12, 1990, the day after I signed the plea agreement, and May 7, 1990, the day before I was given Rule 11, to be arraigned, counsel did not meet or discuss with me my case, my defenses, nor did he interview a single witness of the defendant, even though I was strongly protesting my innocence. Hundley confirms this affirmation of my innocence in his affidavits. (See Hundley affidavits.)

On April 23, 1990, the United States Attorney asked to interview me, and a meeting was held at my office with two representatives of the U. S. Attorney's Office, as well, two Special Agents of the I. R. S. in attendance. The purpose was to prepare me for the testimony I was to give on May 3, 1990, as a witness for the government in a pending case. Hundley was not present.

The meeting started with U. S. Attorneys sharing with me a copy of the indictment, and the I insist to this day that this was the first time I had seen the indictment. The U. S. Attorneys told me they wanted to go over the indictment count by count, as they

anticipated this is what I could expect on cross-examination.

I denied any guilt as to the counts in the indictment, when each count was reviewed by the U. S. Attorneys. The meeting blew up and the U. S. Attorneys and Special Agents of the I. R. S. left my office. Assistant U. S. Attorney, Mr. Savage, immediately contacted the defendant's counsel, Hundley, and advised him that the Plea was lost, that he (Hundley) would have to straighten defendant (Moore) out, because Moore was admitting nothing, insisting he was not guilty. (See Hundley affidavit A-50.) Counsel called Moore and expressed his concern about the meeting, and advised Moore to admit guilt even though he (Hundley) knew that Moore never admitted his guilt to him at any time, in order to save the Plea, which meant to me the six month sentence of incarceration; no civil liability, and no restitution. I had not been arraigned at this time.

Other than a fifteen hour interview with the U. S. Attorney's Office on January 10th, 1990, this is the amount of time for which Hundley submitted invoices on a case he now claims in opposition to the 2255 motion case, which he knew the extent of, but never once investigated.

December, 1989	2 hours
January, 1990	3 hours
February, 1990	2 hours
March, 1990	3 hours

On May 7th, 1990, the eve before defendant was to enter his pleas of guilty, Hundley, at 10:30 p.m., in a bar at a hotel in Charleston, Hundley advised me by telephone, that the government had delivered to him a 28 page memorandum and an

affidavit that they intended to lodge with the Court at the arraignment hearing at 9:30 a.m., May 8, 1990. Said memorandum contained matters completely outside the indictment.

Counsel advised me that since the government insisted on the memorandum and affidavit the defendant would plead not guilty. The government insisted it would be submitted, and Hundley advised them, and me, that the Plea would be not guilty. (See Hundley Affidavit (A 45; A51.) This advice was given at approximately 11:00 p.m., May 7th, 1990, to me, by telephone. Hundley chose not to meet with his client, but said I'll see you at 8:00 a.m. at your office. The defendant and his wife retired that evening knowing the defendant would be pleading not guilty the next morning, which is what defendant desired to do all along. At 8:00 a.m., on May 8, 1990, the defendant and his wife met with Hundley, and Hundley again advised me that I would plead not guilty. (See testimony of Mrs. Shelley R. Moore. (A-74)

I asked Hundley a question, which was "Since I signed a plea agreement agreeing to enter a plea of guilty, could I now plead not guilty and repudiate the Plea Agreement?" Hundley said, "You can withdraw or change a guilty plea any time before sentencing". I trusted Hundley with this advice, and so did Mrs. Moore (See testimony of Mrs. Shelley R. Moore. A-74 to 76)

At 8:30 a.m., John Campbell, U. S. Attorney, called defendant's office and asked for Hundley. Campbell had advised Hundley that the government had decided not to submit the memorandum and affidavit today or at any time. Counsel told defendant of this conversation, and told defendant he would plead guilty, because the government agreed not to submit the

memorandum and affidavit at any time, this was in exchange for the guilty plea. Said memorandum contained malicious and untrue allegations.

Hundley advised me that this would save the plea, and the six month sentence of incarceration.

At 9:30 a.m., May 8th, 1990, the defendant and his counsel appeared before Judge J. Hoffman, at the arraignment hearing. The Court asked the defendant how he pled; the defendant refused to plead. Defendant's counsel urged, coerced and pulled on defendant's coat urging him to plead guilty, even though he knew defendant believed himself to be not guilty. Finally after the passage of time and patience of the Court, the defendant pled guilty to Count One. As to Count Two, there was the same delay and refusal to plead. Counsel went through the same coercive actions, pulled on my coat, and I finally pled. These actions by the defendant are supported by Hundley's affidavit, and by various news reporting agencies. (See Hundley affidavit A-51.) (See The Charleston Gazette article A-57.)

After the arraignment of May 8th, I continued to represent to Hundley I was not guilty. This is supported by Hundley's affidavits (A-44,46) A-48-54). It was on May 8th that I received a copy of the tape recording allegedly setting forth obstruction of justice information. A review of these recordings showed that defendant did not obstruct justice; that on three or four occasions the I urged John Leaberry to tell the truth. If Hundley would have ever reviewed the tapes and their content, it would show Hundley's prosecutorial abuse, circumvention of defendant's counsel; and circumvention of counsel to John Leaberry. The government unilaterally approached Leaberry, without notice to

his counsel of record, wired Leaberry and set up a meeting with defendant, notwithstanding that both defendant and Leaberry were represented by counsel and the government knew this. Hundley, never investigated this fact, nor did he ever inform defendant that there was possible defense to the governments charge of obstruction of justice, the single charge which Hundley has repeatedly stated was the charge that made him (Hundley) plead the defendant on all counts. (Hundley affidavit A-43-47, A-48-54).

Hundley made no contact with me after I entered the plea until on May 29, 1990, Hundley advised me that the government wanted a meeting with me on May 30, 1990. The meeting was said to be a de-briefing. Hundley attended this meeting in which Assistant U. S. Attorneys were present, and several F.B.I. Agents. The defendant again insisted on his innocence, and again the meeting broke up. (Hundley affidavit A-43-47, A-48-54). After the meeting on May 30, 1990 broke up, Moore drove Hundley to the Charleston Airport, and while seated in Moore's car, awaiting his plane, counsel said to Moore, "It's time to withdraw the plea", to which Moore said "Fine". This was twenty-two days after the entry of the plea.

On May 31, 1990, Hundley called me at my office, and advised me that he (Hundley) was dead wrong; that I could no longer withdraw my plea at any time before sentencing; that there had been a change in the Rules which Hundley was not aware. (See Conner affidavit A-58 , and Hundley affidavits. Hundley said not to worry about it that he (Hundley) intended to enter his own affidavit, and that was all that was necessary. I accepted that explanation.

Telephone records show that all contact with Hundley was lost from June 1, 1990 to June 19, 1990. The reason was not my

delay, but Hundley's delay. Hundley slept for three weeks on the Motion to Withdraw the guilty plea and failed to file it, because Hundley went to California, and then to the Virginia shore for two and one-half weeks. This did irreparable damage to my motion. The district court and the fourth circuit, both said defendant waited too long. Defendant didn't wait, there was no indecision on defendant's part, his counsel continued his ineffectiveness by failing to file the motion to withdraw until he got back from vacation.

As if this was not enough, counsel in preparing the motion to withdraw failed to include an affidavit of the defendant, and the district court and fourth circuit court ruled that the late filing and no Moore affidavit prejudiced the withdrawal. All of such ineffectiveness prejudiced the defendant.

On July 9, 1990, the district court heard counsel's argument on the motion to withdraw and denied the motion on grounds that defendant, had not submitted an affidavit in support of the motion; the passage of time before filing and my protestations of innocence were insufficient. In each area it was counsel's ineffectiveness that prejudiced the defendant's motion to withdraw his guilty plea.

1. Hundley's failure to submit defendant's affidavit.
2. Hundley's failure to timely file Motion to Withdrawal.
3. Hundley's failure to establish reported protestations of innocence.

I found out on July 5, 1990, that the U. S. Attorney's Office, unilaterally submitted a Sentencing Memorandum directly to the Court. This Memorandum contained the prejudicial material the government agreed not to submit on May 8, 1990, which

agreement induced and caused the entry of the guilty plea, which until such agreement, the government was advised I would plead not guilty. The material not only violated the agreement of May 8, 1990, never to submit the material in any form, but violated the Plea Agreement as "making no recommendation as to a specific sentence" to take no position as to sentencing (See Ellis transcript A-83-84. Hundley affidavit A-45-50.) The government in this memorandum to the Judge pleaded for a major sentence and demanded the Court make an example of Moore. See letter from U. S. Attorney to the Court regarding Sentencing Memorandum (A-63-64). See Plea Withdrawal Hearing (A-55).

The District Court acknowledged reading the memorandum, which by its submission blew the government's opposition to the motion to withdraw out of the water. Judge Hoffman, on the record, alerted Hundley of the improper submission and its effect, however, at the urging of the court, Hundley agreed that such sentencing memorandum could be withdrawn, even though the Court had read it, before sentencing. (See (A-55-57)

This improper action by the U. S. Attorney and the sentencing court's recognition of it presented Hundley with all he needed to withdraw the plea, but he missed this opportunity entirely and actually joined in the motion to withdraw the very material that was never to be submitted per the agreement of May 8, 1990, which induced the guilty plea, and further, Hundley required me to sign for its withdrawal. I had not seen or read the letter or sentencing memorandum. Hundley had the most damaging piece of evidence, but he totally failed to see it. It is clear that the governing case law, namely, United States v. Corsentino, 685 F.2d 48 (1982) and U. S. v. Casamento, 887 F.2 1141 (2nd Cir

1989); and U.S. v. Cook, 668, f.2d 317 7CA; U. S. v. Miller, 562, f.2d 1273 3CA, follows the proposition that where the prosecutors agree to take no recommendation as to a specific sentence, and to take no position at sentencing, and, then the government unilaterally submits a sentencing memorandum, which the court knew to be improper, a plea must be allowed to be withdrawn. This ineffectiveness by Hundley drops materially below standards of Strickland, and any other case. Hundley had absolutely no idea of the incredible significance of the governments submission of said sentencing memorandum, as it related to the withdraw my guilty plea. See July 9th, 1990 hearing. See motion to withdraw (A-79 -80) Review of this colloquy standing alone in ineffectiveness.

In addition, Hundley promised the court on July 9, 1990, that he would submit the defendant's version of the case to the court for its consideration before sentencing. He never did it. Thus the pre-sentence investigation to the Court is silent as to the defendant's version of the case. The Court told him he could file it, Hundley advised the court he would file it, but, to date, Hundley has not done so. (See July 9th, 1990 hearing A-79-80.)

This ineffectiveness haunted the defendantevery step of his incarceration because no one ever had the benefit of the defendant's version of the case. Finally, Hundley committed another act of ineffectiveness of counsel, by permitting the district court to levy fines upon the defendant, far in excess of those provided by statute. Counsel never once reviewed the allowable fines in the defendant's case. Counsel's ineffectiveness placed a further burden on his client by never objecting to the level of fines.

On Counts One and Two, the Court levied fines $89,000 in

excess of what the statutes provided. In Count One, the Court levied a fine of $50,000, when the Court was without jurisdiction to levy a fine in excess of $1,000.

In Count Two, the Court levied a fine of $50,000, when the Court was without jurisdiction to levy a fine in excess of $10,000.

In Count Five, a new guideline count, the Court levied a fine of $50,000, when the Court was without jurisdiction to levy a fine at level 10 in excess of $20,000.

Counsel's ineffectiveness caused the defendant to pay fines of $119,000 beyond the maximum fines should have been. The maximum fine in Count One is $1,000; the alleged acts in that Count occurred in 1984; the maximum fine on Count Two is $10,000; the alleged acts in that Count occurred in 1985; the maximum fine under Count Five at a level 10, is $20,000. The ineffectiveness of Hundley was further compounded when Assistant U. S. Attorney Savage unilaterally recommended in violation of the plea agreement to the Bureau of Prisons that Moore's sentence was an A-1 sentence, which provides for parole eligibility upon serving one-third of the sentence, rather than the correct sentence, which was a B-2 sentence, which U. S. Attorney Savage knew it to be, which sentence provides for immediate eligibility for parole, and Hundley at no time nor in any pleading in a court of record, brought these matters to the attention of any Court.The district court in denying the instant motion, found that Hundley knew the law with respect to the guidelines. How could Hundley know the guidelines where I get fined in excess of the guidelines considering there were pre-guidelines counts and one (1) guideline count at Level 10. The unbiased Conner affidavit totally refutes this claim, and sup-

ports the fact that Hundley knew absolutely nothing about the guidelines and did nothing to find out. Further, how could Hundley claim and the court find he was effective when her permits the plea agreement to provide for restitution when all facts, even the government's version support the promise by the government there would be no restitution. (See Conner affidavit A-58). Clearly, the totality of the ineffective representation must not be overlooked. The district court erred by not considering all of these points I have raised. The district court only let me present evidence on four (4) areas. I have submitted to this Court numerous errors and omissions of Hundley's representation, all of which, standing alone have been held to be ineffectiveness of counsel in federal and state courts throughout the United states.

In conclusion, Hundley was told by the sentencing judge by order dated July 3rd, 1990, but not filed until at least July 5th, 1990, to get a divorce from Mr. Moore.

The Judge said there was a prima facia case of ineffectiveness. However, Hundley insisted he stay in the case and convinced me he should. Hundley was going to be a witness, but still did not withdraw. He violated every ethical rule which dictates he should withdraw. (See Order entered by Judge regarding ineffectiveness A-85-88.) See Bowman affidavit on professional ethics violations of Hundley (A-89). Again, the Judge tells Hundley, or at least hints to Hundley to get out of the case, but he does not. And again I am charged with his errors because every court holds me to a standard. Plain and simple the district court erred in limiting me to four (4) issues, the circuit court sanctioned this error and this court should review.

A review of this Petition should compel this court to hear the entire story.

CONCLUSION

I respectfully submit to this Honorable Court that there are necessary and compelling reasons set forth herein, and therefore I request the Court to grant this Petition.

Respectfully submitted,

ARCH A. MOORE, JR.
Petitioner, Pro Se
511 Seventh Street
Moundsville, WV 26041

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ARCH A. MOORE, JR.,
Defendant-Appellant.
No. 92-6419
United States Court of Appeals,
Fourth Circuit
Argued: April 2, 1993
Decided May 26, 1993

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Richard L. Williams, Senior District Judge, sitting by designation. (CR-90-78)

Argued: Stephen Vincent Wehner, Santarelli, Smith Carroccio, Washington, D.C., for Appellant.

On brief: Richard O. Wolf, Santarelli, Smith & Carroccio, Washington, D.C., for Appellant

Michael W. Carey, United States Attorney, Charleston, West Virginia, for Appellee.

S.D.W.Va.

AFFIRMED.

Before RUSSELL, PHILLIPS, and MURNAGHAN, Circuit Judges.

PER CURIAM:

Arch A. Moore, Jr. appeals from an order of the district court denying his motion for a writ of habeas corpus. In support of his motion to vacate pursuant to 28 U.S.C. s 2255, Moore has claimed that his sentence violates his federal constitutional

rights because he received ineffective assistance of counsel when pleading guilty to the underlying charges. Moore's defense attorney at that time was William Hundley.

Moore retained Hundley in November 1989 to represent him in an ongoing federal investigation being conducted by a grand jury in Charleston, West Virginia. Hundley, an experienced criminal defense attorney, (FN1) had successfully represented Moore in two previous matters. (FN12) Moore himself is also a member of the bar, and maintained a private law practice prior to serving three terms as Governor of West Virginia.

As part of his representation of Moore during the investigation, Hundley appeared with him for two sworn statements Moore agreed to give government investigators. In those statements, Moore admitted to federal investigators that he had conducted an illegal or "underground" cash campaign in support of his successful bid for governor in 1984. Hundley also talked to lawyers of several Moore "loyalists," including his 1984 and 1988 campaign managers and two members of his campaign finance committee, and discovered that they were cooperating with the government and giving evidence against Moore. In addition, Hundley learned that several other witnesses had reported to government investigators that they had given cash to Moore as part of the illicit fundraising scheme.

In both of his sworn statements to government agents, Moore denied ever discussing the investigation with John Leaberry, his 1988 campaign finance chair, and further denied recently meeting with Leaberry. In fact, however, Moore had met with Leaberry on January 8, 1990, only two days before Moore gave his first sworn statement to federal investigators. Unbeknownst to Moore, his meeting with Leaberry was recorded. The recording disclosed that Moore's primary purpose

in meeting with Leaberry was to discuss the investigation and to plan what they would tell investigators about certain subjects. Moore encouraged Leaberry to lie about Moore's receipt of cash during the 1988 campaign and promised Leaberry he would do the same.

On April 9, 1990, after Moore's second sworn statement was completed, prosecutors told Hundley of the Leaberry tapes and of the fact that Paul Kizer, a West Virginia coal operator from whom Moore, while governor, had received $500,000, was cooperating in the investigation. Hundley confronted Moore with the new evidence against him and learned for the first time from Moore that a retainer agreement between Kizer and Moore, which had been relied upon as evidence of the legitimacy of Kizer's sizable payment to Moore, had been fabricated.

On April 11, 1990, Hundley himself reviewed the Leaberry tapes. Thereafter he began plea discussions with Moore and the United States. Hundley rejected the government's first offer to allow Moore to dispose of the case against him by pleading to a RICO charge. Eventually, Hundley strongly recommended that Moore accept a plea agreement proposed by Hundley wherein he would plead guilty to five felonies: mail fraud, extortion, obstruction of justice, and two tax charges. He told Moore that a jail term was inevitable under the one count covered by the Sentencing Guidelines, but that they would attempt to obtain probation on the four remaining counts. He also informed Moore that the government would agree not to seek restitution of the payment Moore received from Kizer.

On April 12, 1990, Moore signed the written plea agreement; and, on May 8, 1990, he entered guilty pleas to each of the five felony counts. On June 27, 1990, Hundley filed a motion to

withdraw each of the guilty pleas on Moore's behalf. On July 9, 1990, the district court heard argument and accepted affidavits in support of and in opposition to that motion and denied the motion. The next day, the district court sentenced Moore to six months on Count One; five years on Count Two; two years on Count Three; two years on Count Four: and ten months on Count Five. The sentences imposed on the first four counts were to run concurrently. The sentence imposed on Count Five - the only guidelines charge - was to run consecutively to the other sentences. Moore began serving his sentence on August 7, 1990.

In pronouncing sentence, the district court informed Moore that, with respect to his sentences for the four non-guidelines counts, he was eligible immediately for parole. After the sentencing hearing, Moore discussed the meaning of "Immediate eligibility" with Hundley. Hundley and his law partner, Larry Gondelman, who had assisted Hundley in representing Moore at the plea withdrawal hearing and the sentencing hearing, informed Moore that, while he would be immediately eligible, he would not necessarily be released immediately after he had served his time on the one guidelines sentence. They explained to Moore that the ultimate decision would be made by the parole board. They discussed with Moore the possibility of hiring Cecil McCall, an expert in the area, to consult with them in an effort to estimate accurately what Moore's likely parole date would be.

Although McCall was not retained, Moore did hire Hundley to represent him before the parole board at Federal Prison Camp Maxwell, Maxwell Air Force Base, Montogmery, Alabama. Hundley appeared before the parole board there on Moore's behalf. Moore also retained Hundley to represent him in the civil

lawsuit filed against him by the State of West Virginia and in the direct appeal of his convictions to this court.

Moore filed the present petition seeking a writ of habeas corpus with the United States District Court for the Southern District of West Virginia on July 31, 1991. Moore alleged that Hundley had ineffectively assisted him by failing to investigate fully the government's case against him and by misinforming him about several, allegedly deciding factors causing him to plead guilty, namely parole eligibility, possible sentence, the potential civil consequence of his pleas, and his ability to withdraw his pleas once entered.

The district court held an evidentiary hearing on January 7, 1992. In support of his motion, Moore and his wife testified and he also submitted several affidavits and exhibits. The government called Hundley, Gondelman, and John Kuklar, the probation Officer who prepared Moore's pre-sentence report. On February 24, 1992, the district court denied Moore's motion after concluding that Moore had failed to prove that the level of Hundley's service fell below an objective standard of reasonableness, and that he would have pled not guilty but for Hundley's advice. We review the district court's findings of fact supporting its ruling for clear error. If the court found any facts which might support a sixth Amendment claim, we would review de novo its ultimate conclusion that the sixth Amendment was not violated.

In moving to vacate his conviction and sentence under 28 U.S.C. 2255, Moore bore the burden of proving his allegation of ineffective assistance of counsel by a preponderance of the evidence. See Vanater v. Boles, 377 F.2d 898 (4th Cir. 1967); accord Polizzi v. United States, 926 F.2d 1311, 1321 (2nd Cir.

1991). The Supreme Court has established a two-prong standard for claims of ineffective assistance of counsel. See Strickland v. Washington, 466 U.S. 668 (1984); Hill v. Lockhart, 474 U.S. 52 (1985) (adapting the Strickland standard to claims involving guilty pleas). Under that two-prong standard, Moore first must have demonstrated that his counsel's representation fell below "an objective standard of reasonableness" given "prevailing professional norms." Strickland, 466 U.S. at 687-688; see also Becton v. Barnett, 920 F.2d 1190, 1192 (4th Cir. 1990). Specifically, Moore must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance ... (C)ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690.

After having proven incompetent performance by counsel, Moore would have to establish that he was prejudiced by such defective performance; that is, he must prove "a reasonable probability that but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill, 474 U.S. at 59; see also Becton, 920 F2d at 1192. Only if both of those elements are established can it be concluded that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial (here, the proceeding) cannot be relied on as having produced a just result." United States v. DiTomasso, 817 F2d 201, 215 (2nd Cir. 1987); cf. Strickland, 466 U.S. at 687 (stating that the benchmark for an ineffective assistance of

counsel claim is whether there was a "breakdown in the adversary process that renders the result unreliable").

An additional consideration in reviewing the advice of counsel with respect to a guilty plea is the effect of the Rule 11 proceeding. The Supreme Court has concluded that the Rule 11 hearing by design acts as a "formidable barrier in any subsequent collateral proceedings." Blackledge v. Allison, 431 U.S. 63, 73-74 (1977); of United States v. Lambey, 974 F.2d 1389, 1394 (4th Cir. 1992) (en banc) ("If an appropriately conducted Rule 1, proceeding is to serve a meaningful function, on which the criminal justice system can rely, it must be recognized to raise a strong presumption that the plea is final and binding.")

Moore's first claim of error is the alleged failure of Hundley to investigate and raise defenses. However, the record supports the district court's conclusion that Hundley was well aware of the scope and strength of the government's case against Moore at the time he advised Moore to enter the plea. While present counsel may disagree with the strategy advanced by Hundley, Hundley's performance was objectively reasonable and certainly well within Strickland's requirements. Moreover, Moore has failed to demonstrate that he has been prejudiced by an alleged failure on the part of Hundley to develop legal defenses or to discover relevant evidence. None of the possible legal strategies Moore has raised on appeal are of sufficient weight to have caused Moore to change his plea. And Moore's contention that Hundley failed to discover critical evidence is rather disingenuous, given that the evidence (such as the content of the tapes) was within the personal knowledge of Moore. Consequently it is difficult to imagine how failing to uncover such

evidence could prove irresponsible professional conduct here. The district court's conclusion was not clearly erroneous.

Similarly, the district court's conclusion that, contrary to Moore's assertions, Hundley did not misinform Moore about his parole eligibility does not appear to be incorrect. Hundley did inform Moore that he would possibly receive parole on the first four counts, but stated that such a result would be a target, not an immediate certainty. Moreover, based on the information contained in the plea agreement and his colloquy with the judge at his Rule 11 hearing, Moore should have known at the time he pleaded guilty that the total sentence could be as high as 36 years and that the final sentence was within the sole discretion of the court. Finally, we have held that "(a)n attorney's 'bad guess' as to sentencing does not justify the withdrawal of a guilty plea and is no treason to invalidate a plea." See Little v. Allsbrook, 731 F.2d 238, 241 (4th Cir. 1984) (holding that a defendant's alleged expectations of parole did not render his plea involuntary).

Moore next has challenged Hundley's advice on the grounds that Hundley mistakenly informed him that he could withdraw his guilty plea once entered. However, the advice Moore has pointed to was offered after he entered his pleas. Thus, the advice could not have affected Moore's decision to enter the pleas. Additionally, Moore admitted at the evidentiary hearing that he could not be sure that correct advice as to the ease or difficulty of withdrawing his pleas would have altered his decision to plead guilty.

Moore also has asserted that Hundley gave him bad advice with respect to possible civil liability for his activities covered by the counts in the plea agreement. The district court found that Hundley never told Moore that Pentering a guilty plea would

forestall all civil liability, and that, at most Hundley only discussed with Moore the possible direct liability Moore might face as a result of the pleas. The government had assured Hundley that it would not seek restitution of the $500,000 extorted from Kizer. But, when he entered his guilty pleas, Moore was told that the government could not promise protection from state proceedings, and Moore twice replied that he understood that fact. Accordingly, we do not find clear error in the district court's finding that Hundley gave Moore correct advice regarding possible liability and that, further, Moore failed to demonstrate that he would not have pled guilty but for the advice.

Moore's final challenge to the legal assistance provided by Hundley has centered on the Rule 11 hearing. Moore has argued that the protection afforded by Rule 11 was subverted by Hundley's conversation with him during the proceeding and by Hundley's failure to object to the procedure followed by the district court in conducting the Rule 11 hearing.

Both challenges to the Rule 11 hearing are meritless. In the original Moore case, we concluded that Moore "was simply not convincing in claiming that the Rule 11 plea was not knowing and voluntary." United States v. Moore, 931 F.2d 245, 248 (4th Cir. 1991). Moore's newest challenge to his pleas still does not convince us that Moore, an experienced lawyer and three-term governor, was "coerced" into pleading guilty by Hundley's "coaching" during the Rule 11 hearing. Nor do we find any merit in Moore's challenge to the district court's ordering of the Rule 11 proceeding. Moore fails to cite authority for the proposition that a factual basis must proceed the tender of pleas at a Rule 11 hearing. In addition, the order did not influence his plea, as he

himself admitted in the Rule 11 hearing when he stated after the factual basis was offered, that there was nothing about it which would affect his pleas.

In conclusion, the district court did not err when it concluded that Moore failed to meet his burden of proof under 2255. Accordingly, its decision should be

AFFIRMED.

FN1. After being admitted to the practice of law in December 1950, Hundley jointed the Justice Department and served as head of its Organized Crime Section from 1958 until he left the Department in 1964. After leaving the Justice Department, he established and conducted a private practice consisting almost exclusively of federal white-color criminal defense.

FN2. Moore had retained Hundley on two other occasions. In the early 1970's Hundley was retained to represent Moore in a criminal tax investigation. No charges were brought against Moore as a result of that investigation. Hundley was again retained by Moore as his Washington counsel in a matter that resulted in Moore being indicted, tried and acquitted of one count of extortion under the Hobbs Act.

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
Charleston Division

ARCH A. MOORE, JR.,	)	
	)	
Petitioner,	)	
	)	Civil No. 2:91-0797
v.	)	(CR. 2:90-00078)
	)	
UNITED STATES OF AMERICA,	)	
Respondent.	)	

FINAL ORDER

The matter is before the Court on the petitioner's motion to vacate his judgment of conviction and sentence, pursuant to Title 28, United States Code, Section 2255. For the reasons stated in the accompanying Findings of Fact and Conclusions of Law, the petitioner's motion is DENIED.

It is so ORDERED.

Let the Clerk send a copy of this Final Order and the accompanying Findings of Fact and Conclusions of Law to the petitioner and all counsel of record.

/s/ 2/20/92 — DATE

/s/ Richard L. Williams — UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

Charleston Division

ARCH A. MOORE, JR.,
Petitioner,

v.

Civil No. 2:91-0797
(CR. 2:90-00078)

UNITED STATES OF AMERICA,
Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter is before the court on the petitioner's motion to vacate his judgment of conviction and sentence of imprisonment, pursuant to Title 28, United States Code, Section 2255. On January 7, 1992, an evidentiary hearing was held before the Court on four delineated issues: (1) William G. Hundley's ("Hundley") advice regarding parole eligibility; (2) Hundley's advice regarding civil liability; (3) Hundley's advice regarding the sentencing effects of pleading guilty to Counts One through Four; and (4) Hundley's advice regarding the withdrawal of pleas. The Court now makes the following Findings of Fact and Conclusions of Law on these four issues and the Petitioner's remaining arguments.I. Introduction

FINDINGS OF FACT

1. The petitioner, Arch A. Moore, Jr. ("Moore"), pleaded guilty of all five counts of the indictment against him. The indictment charges the petitioner with one count of mail fraud, 18 U.S.C. 1951 (Hobbs Act), in connection with $573,000 extorted under color of official right; two counts of filing false tax

returns, 26 U.S.C. 7206 (1); and one count of obstructing justice, 18 U.S.C. 1503, in connection with the grand jury investigation.

2. The petitioner pleaded guilty, pursuant to a written plea agreement, on May 8, 1990, before the Honorable Walter E. Hoffman.

3. On June 27, 1990, the petitioner filed a motion for leave to withdraw his plea. A hearing was held on July 9, 1990, and the motion was denied.

4. On July 10, 1990, the petitioner was sentenced. The sentences on Counts One through Four were subject to pre-guideline sentencing. The sentence on Count Five was calculated in accordance with the sentencing guidelines.

5. The petitioner was sentenced to the following terms of imprisonment: Count One—six months; Count Two—five years; Count Three—two years; Count Four—two years; and Count Five—ten months. The sentences imposed on the first four counts run concurrently. The sentence imposed on the fifth count runs consecutively to the other sentences. The petitioner began serving his sentence on August 5, 1990.

6. The petitioner filed a direct appeal with the Fourth Circuit based on (1) the lower court's refusal to grant an evidentiary hearing on the motion to withdraw his pleas, (2) the failure of the government to disclose its agreement not to introduce the written statement of facts at the Rule 11 hearing, and (3) the government's alleged breach of the plea agreement in seeking a severe sentence. The Fourth Circuit rejected the petitioner's arguments and affirmed the judgments against him. See United States v. Moore, 931 F.2nd 245 (4th Cir.), cert. denied, 116 L. Ed. 2d 134 (1991).

7. The petitioner filed the instant motion on August 1, 1991. The petitioner argues, generally, that he received ineffective assistance of counsel and that each count is inadequate, as a matter of law, to support the judgment of conviction against him.

CONCLUSIONS OF LAW

1. The petitioner bears the burden of proving his allegations by a preponderance of the evidence. See, e.g, Polizzi v. United States, 926 F.2d 1311, 1321 (2d Cir. 1991).

2. The claim of ineffective assistance of counsel is governed by the two prong analysis of Strickland v. Washington, 466 U.S. 668 (1984), as modified for guilty pleas in Hill v. Lockhart, 474 U.S. 52 (1985).

3. Under Strickland, the petitioner must first "show that counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688. The petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id. at 690. In evaluating the quality of representation, "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id.

4. Under the second prong of Strickland, "the defendant must show that the deficient performance prejudiced the defense." Id. at 687. In the context of a plea, this requires "show[ing] that there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trail." Hill v. Lockhart, 474 U.S. 52, 59

(1985); Becton v. Barnett, 920 R.2d 1190, 1192 (4th Cir. 1990).

5. Not all errors by counsel create a constitutional infirmity in the guilty plea. Some mistakes are not central enough to the decision to plead guilty to constitute a deprivation of the defendant's right to counsel. The Fourth Circuit has consistently refused to invalidate pleas based on counsel's failure to inform the defendant of the collateral consequences of his plea. See, e.g., United States v. McHan, 920 F.2d 244, 245-47 (4th Cir. 1990) (failure to inform defendant that pleading guilty might expose him to continuing criminal enterprise charge); United States v. Yearwood, 863 F.2d 6, 7-8 (4th Cir. 1988) (failure to inform defendant that pleading guilty would expose him to deportation); Little v. Allsbrook, 731 F. 2d 238, 241 (4th Cir. 1984) ("An attorney's 'bad guess' as to sentencing does not justify the withdrawal of a guilty plea and is no reason to invalidate a plea.").

6. Even where a defendant has been misadvised about a central issue, his misapprehensions may be "cured" by the Rule 11 proceeding:

> {W}e conclude that when information given by the court is said to conflict with earlier information given by the defendant's attorney and the defendant admits to understanding the court's advice, the criminal justice system must be able to rely on the dialogue between the court and defendant.
>
> . . . . . .
>
> Statements of fact by a defendant in Rule 11 proceedings may not ordinarily be repudiated, and, similarly, findings by a sentencing court in accepting a plea 'constitute a formidable barrier' to attacking the plea.

United States v. Lambey, 949 F.2d 133, 137 (4th Cir. 1991) (citing Blackledge v. Allison, 431 U.S. 63, 73-74 ("[T]he representations of the defendant, his lawyer, and the prosecutor at such a hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings.")); see also Little v. Allsbrook, 731 F.2d 238, 239 n.2 (4th Cir. 1984) ("Unlike Little, we attach considerable importance to this procedural dialogue. . . . In the absence of clear and convincing evidence to the contrary, Little must be bound by what he said at the time of his plea."). II. Failure To Investigate And To Raise Defense

FINDINGS OF FACT

1. The petitioner was represented during the investigation, plea, sentence, and appeal phases of his case by William G. Hundley, a lawyer from Washington D.C. who has forty-one years of experience in criminal practice. Hundley has represented Moore in federal criminal investigations on three occasions over the last twenty years. Evidentiary Hearing Transcript, January 7, 1992, at 68-71 (hereinafter "Evidentiary Transcript").

2. Hundley was retained in mid-November of 1989 to represent Moore in connection with the instant federal investigation. The investigation was coordinated by the United States Attorney's Office in the Southern District of West Virginia and concerned Moore's 1984 campaign for the office of Governor of West Virginia and his conduct while Governor. Evidentiary Transcript, at 10-11, 71.

3. Mr. Larry S. Gondelman ("Gondelman") aided Hundley in Moore's representation. Gondelman has been an attorney for fourteen years and has for those fourteen years been associated

with Hundley. Evidentiary Transcript, at 130-31.

4. Moore is himself an experienced attorney. Evidentiary Transcript, at 9-10.

5. On April 9, 1990, the government informed Hundley that it had tape recordings of conversations between Moore and Paul Kizer and between Moore and John Leaberry—Leaberry was Moore's 1988 campaign manager. The government informed Hundley that, in its opinion, the tapes showed Moore engaging in the obstruction of justice. While Hundley was generally informed of the content of the tapes, the government refused to allow either Hundley or Moore to listen to them. Evidentiary Transcript, at 13-14, 72-73.

6. The government inquired whether Moore would be interested in a plea bargain. When Hundley related this information to Moore, Moore directed Hundley to find out what the government would offer. Moore also suggested that he might be able to help the government with its case against William T. Ellis. Evidentiary Transcript, at 72-73.

7. On April 11, Hundley was allowed to listen to the tapes for the first time. Later that afternoon, after a series of plea negotiations with the government, Hundley met with Moore and strongly advised him to sign the plea agreement. Evidentiary Transcript, at 16-17, 76-80.

CONCLUSIONS OF LAW

1. The petitioner has failed to prove that the level of investigation and research engaged in by Hundley fell below an objective standard of reasonableness. Hundley is an experienced lawyer who, relying on his experience and professional judgment, determined that his client's interests would be best served by pleading guilty. To this end, Hundley negotiated with

the government, within the time constraints set by the government, to achieve the best plea bargain possible. Hundley then recommended to Moore that he should plead guilty and cooperate with the government. It was Hundley's professional opinion that this course of conduct maximized Moore's chances of receiving a relatively light sentence. Once an attorney has identified what course of representation will be in his client's best interest, he has an obligation to pursue that course zealously, and that is exactly what Hundley did in the instant case.

2. While counsel in an ideal world would have had sufficient time to do further investigation and research, this was not the state of affairs with which Moore and Hundley were faced. The government forced them to make their decision with in a very narrow time frame. While present counsel may, in hindsight disagree with the strategy advanced by Hundley, counsel's performance must be evaluated in light of the circumstances existing at the time and absent the advantages of twenty-twenty hindsight. See, Strickland, 466 U.S. at 690. Even without these admonitions, the Court would find that Hundley's actions were objectively reasonable. He adopted a strategy he reasonably believed to be in his client's best interest and focused on the execution of that strategy.

3. The petitioner has also failed to show prejudice. While a few of the legal arguments raised by the petitioner are non-frivolous, none of them are of sufficient weight to have caused the petitioner to change his plea.[1]

4. The petitioner has also failed to reveal any evidence that would have changed his plea. The most substantial circumstance the petitioner has raised was his inability to evaluate the tape for himself. As with all the evidence Hundley allegedly

failed to discover, Moore had personal knowledge of this information. Thus, it is difficult to see how "discovery" of this, or any of the other allegedly undiscovered evidence, would realistically have changed Moore's plea.[2] Further, it bears repeating that counsel's performance be evaluated in terms of the circumstances existing at the time. While allowing Moore to listen to the tape may have been desirable, the government refused to allow it. Moore and Hundley were forced to decide whether to accept the plea bargain or refuse it and risk the inclusion of additional counts against Moore, and they had to make this decision within the time and informational constraints placed on them by the government. They weighed the costs and benefits of the alternative courses and ultimately decided that

5. Moore now claims that his statementsduring the Rule 11 hearing were not true; that he and counsel responded as they did in order to "save the plea." Hundley has admitted that he did in part coach Moore's answers during the Rule 11 hearing.[3] Transcript of the Motion to Withdraw Guilty Pleas, July 9, 1990, at 53-54. Nevertheless, the Fourth Circuit's general admonition regarding the acceptance of the truth of a defendant's assertions, made under oath at the Rule 11 hearing, apply with full force in the instant case. The significance of the Rule 11 proceeding is destroyed if a defendant can escape its consequences merely by stating that he was innocent and that he was lying when previously under oath. Moore has introduced no evidence that substantiates his claims of innocence. As stated by the Fourth Court in response to Moore's direct appeal: "There is no substance to Moore's claims. It would be pointless, perhaps even unjust, to allow him to relitigate." United States v. Moore, 931 F.2d 245,

249 (4th Cir.), cert. denied, 116 L. Ed. 2d 134 (1991).III. Issues From The Evidentiary Hearing

A. Advice On Parole Guidelines

FINDINGS OF FACT

1. On April 11, 1990, Hundley brought a copy of the plea agreement and the indictment to Moore's office in Charleston, West Virginia. Moore reviewed the documents and discussed a number of specific issues with Hundley. Based on Hundley's advice and their review of the documents, Moore decided that his interests would be best served by signing the plea agreement, and he signed it on April 12, 1990. Evidentiary Transcript, at 80-81.

2. The plea agreement sets out the maximum penalties Moore could receive on each count. Hearing Exhibit 2, 4. Hundley explained to Moore that because Count Five was governed by the sentencing guidelines, Moore was going to be sentenced to a term of imprisonment on that count. The sentencing guidelines provided for a sentence of 10-16 months. Hundley explained, however, that if Moore cooperated with the government and accepted responsibility, the range could be lowered to 6-12 months. Evidentiary Transcript, at 20, 81. Hundley also advised Moore that because the other sentences were non-guideline he could possibly be placed on probation for these counts, and that this would be their goal. Evidentiary Transcript, at 81, 97.

3. At sentencing, Judge Hoffman stated as a condition of the sentences on Counts One through Four that Moore "may be released on parole at such time as he may be designated by the authority empowered to make such determination as to offenses committed prior to November 1, 1987." Sentencing Transcript, July 10, 1990, at 94-96.

4. At a family meeting after sentencing, Moore told his family that he was immediately eligible for parole. Evidentiary Transcript, at 94-95, 133. Hundley and Gondelman informed Moore that while he was immediately eligible for parole, the ultimate decision rested with the Parole Board, which had its own set of guidelines and tended to apply them quite formalistically. Evidentiary Transcript, at 95, 133, 145-47. The parties also later discussed hiring Cecil McCall, an attorney who had been the Chairman of the Parole Board, for the express purpose of handling issues surrounding the setting of Moore's parole eligibility. Evidentiary Transcript, at 95-96, 134.

CONCLUSIONS OF LAW

1. Hundley never misinformed the petitioner as to his parole eligibility. Hundley did inform Moore that he could possibly receive probation on the first four counts. At worse, this advice, was correct, but slightly over-optimistic. Hundley was clear, however, that this was their goal and not a promise or estimate of the sentence Moore would receive or the amount of time he would actually spend in prison.

2. Even assuming, arguendo, that Hundley's statements were a prediction that Moore would be paroled after only six months, the law is clear that an attorney's erroneous estimate of parole eligibility on a sentence that has not yet been determined does not constitute ineffective assistance of counsel. See, e.g., Little v. Allsbrook, 731 F.2d 238, 241 (4th Cir. 1984) ("Neither Little nor [his attorney] knew what sentence would be imposed, and therefore, any statement made by [the attorney] concerning parole eligibility was mere speculation. An attorney's 'bad guess' as to sentencing does not justify the withdrawal of a guilty

plea and is no reason to invalidate a plea.").

3. Moore knew, at the time he pleaded guilty, that the total sentence he would receive was within the discretion of the sentencing judge. The plea agreement sets out the maximum sentences for the charged offenses and explicitly states that Moore faced "a total exposure of thirty-six (36) years." Hearing Exhibit 2, § 4. It also states that "[i]t is understood that the matter of sentencing is within the sole discretion of the Court and the United States will make no recommendation as to a specific sentence." Hearing Exhibit 2, § 9.

4. The Rule 11 hearing was similarly unequivocal. Judge Hoffman stated in regard to the total possible term of thirty-six years: "I am not suggesting to you that that is the sentence in any way, but do you understand that that {sic} it is within the court's power to go that far?" Moore, in turn, asserted that he understood that he could be sentenced to the maximum term. Plea Transcript, May 8, 1990, at 15.

B. Advice On Civil Liability

FINDINGS OF FACT

1. In discussing the indictment, Moore expressed concern regarding the payment of restitution to Paul Kizer. Hundley talked to the government and was assured that the government would not seek restitution of the $500,000 extorted from Kizer. Evidentiary Transcript, at 79, 86.

2. Moore was aware that the IRS was going to seek the taxes he owed; the plea agreement even sets out Moore's obligation to aid the IRS in determining and collecting those taxes. Evidentiary Transcript, at 86; Hearing Exhibit 2, § 6.

3. Hundley never told Moore that pleading guilty would

forestall all civil liability. The conversations they had concerned only the direct liability he might face as a result of the pleas. It stretches credulity to assert that an experienced attorney, either Hundley or Moore, would suggest that pleading guilty would forestall all future, collateral civil consequences. Evidentiary Transcript, at 46, 86-87.

4. Further, Moore was told that whatever protection he received from the plea agreement, "the government cannot give protection as far as any state proceedings may be involved." Moore twice replied that he understood this. Plea Transcript, May 8, 1990, at 21.

CONCLUSIONS OF LAW

1. The advice that Moore received pertained to the civil liability he might suffer as a direct result of pleading guilty. The advice he received in this regard was correct.

2. It is worth noting, that a failure on Hundley's part to advise Moore one way or the other as to state civil liability does not constitute ineffective assistance of counsel. The Fourth Circuit has consistently held that the failure to advise a defendant of collateral consequences, including consequences far more serious than a collateral state civil suit, does not constitute ineffective assistance of counsel. See,, United States v. DeFreitas, 865 F.2d 80, 82 (4th Cir. 1989) (failure to inform defendant of potential for deportation); see also United States v. McHan, 920 F.2d 244, 245-47 (4th Cir. 1990) (failure to inform of possible exposure to a charge of continuing criminal enterprise).

C. Advice On The Sentencing Effects Of Counts One Through Four

FINDINGS OF FACT

1. The plea agreement that Moore signed on April 12, 1990,

sets out the maximum sentence for each count and the maximum aggregate sentence. Hearing Exhibit 2, § 4, at 2-3.

2. In addition to discussing the terms of the plea agreement, Moore and Hundley discussed the applicability of the sentencing guidelines. Hundley advised Moore that the sentence received on the first four counts was not governed by the guidelines and would be within Judge Hoffman's discretion. Evidentiary Transcript, at 85-86, 117.

3. Moore officially confirmed his understanding of all this at his Rule 11 hearing. Judge Hoffman specifically asked Moore whether he understood that it was within the court's power to sentence him to the maximum total penalty of thirty-six years in jail, and Moore asserted that he did. Plea Transcript, May 8, 1990, at 15.

4. Moore also testified that no one, neither his attorney nor the government, had promised him leniency in return for pleading guilty, and that he understood that no recommendation or agreement as to a particular sentence would be binding on the court. Plea Transcript, May 8, 1990, at 18.

5. Moore and Hundley discussed and researched Judge Hoffman's sentencing practices in an attempt to gauge what kind of sentence Moore might receive. Evidentiary Transcript, at 85-86, 117.

6. On May 3, 1990, Moore testified under oath at the trial of William T. Ellis that no promise had been made to him by the government concerning his sentence, except that it would not exceed the 36-year maximum. Transcript of the Jury Trial of William T. Ellis, May 3, 1990, vol. 5, at 4-5.

7. While Moore's appeal was based in part on the government's failure to disclose a promise not described in the

plea agreement, he never contended on appeal that he had not received the sentence he had been promised. Evidentiary Transcript, at 98-99; Hearing Exhibit 27.

8. Hundley never represented to Moore that he would only serve six months in prison. Evidentiary Transcript, at 116-17. Hundley told Moore that the best they could do, the ultimate for which they could aim, was a six month sentence on Count Five and probation on the other counts. Evidentiary Transcript, at 81, 97. It was clear, however, that this was merely their goal, and that the ultimate determination as to Moore's sentence would rest with Judge Hoffman. Evidentiary Transcript, at 85-86, 97, 116-17, 149-50; Plea Transcript, May 8, 1990. 15 12-15, 18.

9. Hundley never advised Moore that the first four counts were "throwaways." Indeed, Moore was warned by counsel and Judge Hoffman that his non-guideline sentences were completely within the discretion of the sentencing court. Evidentiary Transcript, at 85-86, 97, 116-17, 149-50; Plea Transcript, May 8, 1990, at 12-15, 18.

CONCLUSIONS OF LAW

1. Since Moore was never advised that Counts One through Four were throwaways, there was neither inadequate performance nor prejudice.

2. Even if Moore had been so advised, however, it would not constituted ineffective assistance of counsel.

3. Assuming, arguendo, that Hundley gave Moore this advice, it would constitute an estimate of the sentence Hundley thought Moore would receive. Such estimates, even if erroneous, do not form the basis for a claim of ineffective assistance of counsel. Cf. United States v. Lambey, 949 F.2d 133, 136-38 (4th

Cir. 1991) ("Even if the attorney's estimate could be shown to have been made erroneously, an error in estimation is not the basis for setting aside a plea."); Little v. Allsbrook, 731 F.2d 238, 241 (4th Cir. 1984).

4. Further, Moore was clearly informed at the Rule 11 hearing that his ultimate sentence would be within the discretion of the sentencing judge. Thus, any mistaken advice he received would have been cured by the Rule 11 proceeding. See United States v. Lambey, 949 F.2d 133, 137 (4th Cir. 1991).D. Advice On Withdrawing His Pleas

FINDINGS OF FACT

1. On May 7, 1990, the government gave Hundley a copy of a lengthy statement of facts that the government intended to offer as the factual basis for Moore's plea. Evidentiary Transcript, at 87. Hundley immediately told the government that Moore would not plead guilty if the written statement was filed. Evidentiary Transcript, at 88.

2. Hundley informed Moore of the government's intention and recommended that he not plead guilty if the government insisted on filing the statement. Evidentiary Transcript, at 88.

3. The next morning, May 8, 1990, the government notified Moore and Hundley that it would not file the statement. Moore, however, was concerned that the government might simply give the same statement orally. He questioned Hundley as to whether he could refuse to plead guilty having signed the plea agreement. Hundley assured Moore the the plea agreement would not prevent him from pleading not guilty. Evidentiary Transcript, at 26, 88-89; Hearing Exhibit 14, para. 24.

4. On May 8, 1990, Moore pleaded guilty to all five counts

of the indictment against him. Evidentiary Transcript, at 26, 89.

5. On May 30, 1990, Moore was interviewed by federal agents and denied committing some of the offenses to which he had pleaded guilty. Evidentiary Transcript, at 27-28, 90-91.

6. At this point, Hundley broke off the interview. Hundley later suggested to Moore that he should consider withdrawing his pleas. Evidentiary Transcript, at 27-28, 90-91.

7. Hundley incorrectly advised Moore that withdrawing his pleas would be a relatively simple task. Moore indicated to Hundley that he would have to consider the issue and discuss it with his family. Evidentiary Transcript, at 28, 91.

8. Upon returning to Washington, Hundley discovered, through a discussion with Gondelman, that he had been wrong about the ease with which the pleas could be withdrawn. Hundley notified Moore of his mistake within the next day or two. Moore had not decided at this point whether or not he wanted to withdraw his pleas. Evidentiary Transcript, at 91-92.

9. Hundley and Moore met in Washington on June 19, 1990. It was at this meeting that Moore told Hundley that he wanted to withdraw his pleas. The motion to withdraw the pleas was filed on June 27, 1990. Evidentiary Transcript, at 29; Hearing Exhibit 3, at 8.

10. On July 9, 1990, a hearing on the motion to withdraw the pleas was held before Judge Hoffman. Prior to argument, Judge Hoffman questioned Moore about his desire to be represented by Hundley and informed Moore that continuing to have Hundley represent him could result in his waiving any future claims of ineffective assistance of counsel. Moore expressed his desire to have Hundley continue to represent him. Transcript of Hearing to Withdraw Guilty Pleas, July 9, 1990, at 2-3.

CONCLUSIONS OF LAW

1. The only advice Hundley gave Moore on this issue prior to Moore pleading guilty concerned the effect of the plea agreement, and this advise was correct.

2. Any advice Moore received after he entered his pleas is irrelevant. Under the Strickland test, as modified by Hill v. Lockhart, 474 U.S. 52, 59 (1985), a petitioner must show that he would not have pleaded guilty but for the mistaken advise. Obviously, advice that came after the pleas could not have affected the decision to plead guilty.

3. Moreover, Moore admitted at the evidentiary hearing that he could not be sure that correct advise as to the ease or difficulty of withdrawing his pleas would have altered his decision to plead guilty. As such, the petitioner has failed to meet his burden of showing a "reasonable probability" that he would not have pleaded guilty but for the erroneous advise. See Hill v. Lockhart, 474 U.S. 52, 59 (1985); Becton v. Barnett, 920 F2d. 1190, 1192 (4th Cir. 1990).

IV. Petitioner's Additional Claims

Moore has also made a number of additional claims as to why his conviction and sentence must be vacated. The Court determined that these claims did not warrant an evidentiary hearing because they presented purely legal questions.

A. Conduct Of The Rule 11 Hearing

1. The petitioner has argued, raising the issue for the first time at the evidentiary hearing, that the procedure Judge Hoffman used in conducting the Rule 11 hearing—the plea was taken before the government gave its summary of facts—was faulty, and that Hundley failed to notice or object to this faulty procedure.

2. Regardless of Hundley's failure to raise this issue at the Rule 11 hearing, or on the motion to withdraw the plea, it cannot seriously be argued that there was any prejudice to Moore. The government never tried to orally enter the statement of facts. Further, Moore and Hundley both affirmed that the government's summary of the facts was a fair summarization and was substantially correct. Plea Transcript, May 8, 1990, at 31 ("{T}here [were] no variances that would affect [the] plea of Guilty in any way to any of these counts.").

B. Fundamental Sufficiency Of The Legal Claims Against Moore

1. Count One—Mail Fraud

1. The petitioner does not have a colorable claim that the statute of limitations barred his conviction. "{I}t is well settled that the statute of limitations for wire fraud and mail fraud does not begin running with the completion of the fraud scheme; rather, it runs from the date of the charged call or mailing in furtherance of the scheme." United States v. Eckhardt, 843 F.2d 989, 993 (7th Cir.), cert. denied, 488 U.S. 839 (1988).

2. The petitioner argues that the mailing of the false campaign finance statements could not have been in furtherance of the scheme because at the time they were mailed the scheme had already been completed—Moore had already been elected. Even the case cited by the petitioner, however, shows the baseless nature of this argument. See United States v. Keenan, 657 F.2d 41, 43 (4th Cir. 1981). Although the court in Keenan reversed the conviction based on the facts of the case, the court was careful to point out that it "recognize[d] that the use of the mails to conceal a scheme can be conduct which comes within the mail fraud statute." Id. (Citing United States v. Sampson,

371 U.S. 75 (1962)); see also United States v. Lane, 474 U.S. 438, 452 n.16 (1986) ("Our conclusion that the delayed mailings at issue in this case were part of an ongoing scheme to defraud is in accord with our holding in United States v. Sampson, [371 U.S. 75 (1962)]. . . . The Court upheld defendants' convictions for mail fraud because of the 'lulling effect' of the delayed mailings. . . . Had the Lanes failed to submit timely proof-of-loss forms here, the insurer might very well have discovered the fraud."); Eckhardt, 843 F.2d at 994 ("The Supreme Court and this Circuit have held that even mailings and calls which occur after the defendant has obtained the victims' money are in furtherance of the scheme if they facilitate concealment or postpone investigation of the scheme").

3. In the instant case, the mailing of the false campaign finance statements clearly had the effect of concealing the scheme. The false campaign finance statements were an indispensable element in preventing the discovery of the fraud.

4. It is irrelevant whether or not Moore actually prepared the false campaign finance statements. It is sufficient if there was "evidence from which the [fact-finder] could conclude that he knowingly caused the use of the mails to further the scheme." United States v. Bonnette, 663 F.2d 495, 598 (4th Cir. 1981), cert. denied, 455 U.S. 951 (1982). "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." Id. (citation omitted). Here there was evidence that Moore gave his campaign manager at least $100,000 in cash without telling the campaign manager where he had gotten the

money, that the law required the disclosure of the receipt and expenditure of this money, and that he knew it would not be disclosed. Thus, Moore clearly "caused" the mails to be used to aid in the scheme to defraud.

5. The petitioner argues that the governor's salary and the other funds would have been expended whether or not he had been elected. Therefore, he argues, there was no loss of tangible property, and, thus, no criminal offense under McNally v. United States, 483 U.S. 350 (1987). While there may be some facial appeal to the petitioner's argument, the Court fails to find it convincing. Rather, the Court finds the reasoning in United States v. Schermerhorn, 713 F. Supp. 88 (S.D.N.Y. 1989), to be much more persuasive. In Schermerhorn, a case strikingly similar to Moore's, the court held: "[A]lthough it is true that in this case a salary would have been paid to an elected senator from defendant's district, it does not follow the defendant would have received that salary had he not committed the alleged fraud or, more importantly, that if he is convicted of the alleged fraud the State of New York necessarily will be out the entire salary paid as a 'budgeted expenditure.'" Id. at 93 (emphasis original). In Schermerhorn, as here, there was the possibility that the state would recover a portion of the salary through a state civil action. While this provides a sufficient basis for upholding Moore's conviction under McNally, it is not the only basis. See Id. at 92 ("[T]he taxpayers in this case paid a salary for 'damaged or contaminated goods' if the mail fraud counts here charged are proven. Notwithstanding the election of the James Michael Curleys of the world, this court will not abide nor judicially sanction the conclusion that corrupt and non-corrupt elected

officials are of equal value"); United States v. Webb, 689 F. Supp. 703, 707-08 (W.D. Ky. 1988); see also Schermerhorn, 713 F. Supp. at 91 n.4 ("We note that our federalist concerns are somewhat mollified in this case given the obvious public interest in rooting out legally recognized political corruption. In this case, unlike so many earlier mail fraud indictments bottomed on good-government charges where the jury was asked in essence to make moral judgments about an official's behavior, the failure to disclose campaign contributors and their contributions is a recognized criminal violation under" state election law.).

6. The petitioner's argument that the mailing of the false campaign finance statements could not have been in furtherance of a scheme to defraud because they were mailed pursuant to West Virginia law is frivolous. Even the language of Parr v. United States, 363 U.S. 370 (1960), shows the infirmity of the defendant's argument:

> The crucial question . . . . comes down to whether the legally compelled mailings of the lawful--or, more properly, what are not charged or shown to have been unlawful--letters, tax statements, checks and receipts, complained of in those counts, properly may be said to have been for the purpose of executing a scheme to defraud . . . .

Id. at 389 (emphasis added). It is axiomatic that the financial statements in this case are alleged to have been unlawful. As such, the Parr exception on legally compelled mailings is inapplicable. See, e.h., United States v. Dadanian, 818 F.2d 1443, 1446-447 (9th Cir. 1987) ("Here Pitts' statements of economic interest, while required by law to be filed, were false on their face. Unlike Parr, these false statements were made in

furtherance of the scheme to keep secret that Dadanian held the CBC interest for Pitts."), modified and vacated, on unrelated grounds, on reh'g, 856 F.2d 1391 (9th Cir. 1988); United States v. Lindsey, 736 F.2d 433, 437-38 (7th Cir. 1984).

2. Count Two—Hobbs Act Extortion Under Color Of Official Right

1. The government at the Rule 11 hearing was clear as to the nature of the crime committed, and Moore admitted the essential correctness of their recitation of the facts: "He received this money, this half a million dollars, from Mr. Kizer in return for his assistance or his promise of assistance in obtaining a refund of over two million dollars ($2,000,000) for Mr. Kizer's companies from the state Pneumoconiosis Fund, the Black Lung Fund." Plea Transcript, May 8, 1990, at 26-27, 31. The facts as summarized by the government at the Rule 11 hearing clearly demonstrate a quid pro quo as required under McCormick v. United States, 114 L. Ed. 2d 307 (1991).

2. The petitioner's claim that McCormick has changed the law such that the Hobbs Act, 18 U.S.C. 1951, no longer applies to local officials is without merit. The Court cannot agree that the Supreme Court is clearly implying that the Hobbs Act was never intended to apply to local officials. The Court is merely going through the steps necessary to determine if it can address the issue even though it was not raised in the court below. See McCormick, 114 L. Ed. 2d at 323, n.6. The petitioner's argument would require the Supreme Court to consider and reject the full merits of an argument in the very process of determining that its procedural rules prohibit any consideration of the issue beyond plain error.

5. The petitioner's argument that this Court should adopt

Justice Scalia's purported argument that "the statute may not exist" is similarly frivolous. McCormick, 114 L. Ed. 2d at 330 (Scalia, J., concurring). Obviously, a solitary concurrence cannot work a change in existing precedent. Moreover, Justice Scalia never found that the statute did not apply to cases of bribery. Rather, he explicitly raises the issue merely to assure that what he perceives to be an unaddressed assumptions does not, through inattention, take on the force of law. Id. at 330-31 (Scalia, J., concurring) ("I mean only to raise this argument, not to decide it, for it has not been advanced and there may be persuasive responses.").

3. Counts Three and Four—Filing False Tax Returns

1. The petitioner is mistaken in arguing that the indictment charges that the tax returns were filed in the Southern District of West Virginia. Count Three of the indictment charges that "within the Southern District of West Virginia and elsewhere, defendant ARCH A. MOORE, JR. willfully made and subscribed . . . ." Hearing Exhibit 1, at 12. Count Four of the indictment uses the same language. Hearing Exhibit 1, at 13 (emphasis added).

2. The petitioner is also mistaken in arguing that the sentencing court did not have jurisdiction to take the plea. While Moore's tax returns for 1984 and 1985 were actually mailed from Moundsville, West Virginia, in the Northern District of West Virginia, Moore reviewed, corrected, signed, and wrote the check for the returns while he was in Charleston, West Virginia, in the Southern District of West Virginia. See Exhibit C, Government's Response to Defendant's Supplemental Memorandum in Support of the Motion to Vacate Defendant's Conviction and Sentence. Jurisdiction will lie, under Title 18, United

States Code, Section 3237(a), not just where the returns were filed, but also where they were signed. See United States v. Shyres, 898 F.2d 647, 657-58 (8th Cir.) (Jury instruction requiring the defendant to have signed in the district, while unnecessarily narrow as to venue, became the law of the case.), cert. denied, 112 L. Ed. 2d 43 (1990); United States v. Rooney, 866 F.2d 28, 31 (2d Cir. 1989) (and the cases cited therein); United States v. Slutsky, 487 F.2d 832, 838-39 (2d Cir. 1973), cert. denied, 416 U.S. 937 (1974); cf. United States v. Garman, 748 F.2d 218, 219-21 (4th Cir. 1984), cert. denied, 470 U.S. 1005 (1985).

3. The petitioner's argument, based on Title 18, United States Code, Section 3237(b), that jurisdiction was improper and that it was ineffective assistance of counsel not to notify him of his right to have his case tried in the district in which he maintained his residence, must also fail. Title 18, United States Code, Section 3237(b) applies "only when the use of the mails was the basis upon which the United States laid venue in a district other than that of the taxpayer's residence." In re United States, 706 F.2d 494, 496 (4th Cir.), cert. denied, 464 U.S. 997 (1983). Venue in the instant case was not based solely on the mailing of the returns. In fact, the mailing of the returns was not even an alternative basis for venue.

4. Count 5—Obstruction Of Justice

1. The petitioner's argument that he was charged under the wrong statute is misconceived. It is far from clear that the arguments of United States v. Masterpol, 940 F.2d 760, 762,-63 (2d Cir. 1991), even if they were adopted by this circuit, would apply to the instant case. The indictment to which Moore

pleaded guilty charges a range of conduct by which Moore tried to "corruptly . . . obstruct, or impede, the due administration of justice." See 18 U.S.C. 1503. Some of Moore's actions could be characterized as "tampering with witnesses," illegal under Title 18, United States Code, Section 1512. Other conduct, however, exceeds such a narrow characterization. The Court is of the opinion the, in cases where tampering with witnesses is merely part of a more extensive scheme to obstruct or impede the processes of the grand jury, the defendant can be charged with a single count of obstructing justice under Title 18, United States Code, Section 1503; there would be nothing gained by requiring the conduct to be charged as two separate crimes.

2. Moreover, there were sufficient facts in the indictment and sufficient facts presented to the sentencing court to sustain a conviction under Section 1503, even if the evidence regarding tampering with witnesses was excluded. In its summation of facts, the government states, and Moore confirmed, that Moore had given false testimony to agents of the federal government, falsified and back dated documents in support of a cover story, and gave false statements specifically expressing his desire that these statements be submitted to the grand jury. Plea Transcript, May 8, 1990, at 29-30; Hearing Exhibit 1, Count 5, paras. 5-6, 8(D)-8(G), 9(B), 9(D), 10.

3. More importantly, even if the statute was cited incorrectly in the indictment, this would not be grounds for vacating the sentence. Fed. R. Crim. P. 7(c)(3) ("Error in the citation or its omission shall not be ground for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice."); United States v. Duncan, 598 F.2d 839, 854 n.11

(4th Cir.) ("The rule has long been that a conviction may be sustained on the basis of a statute other than that cited in the indictment."), cert. denied, 444 U.S. 871 (1979); see also United States v. Welch, 656 F.2d 1039, 1058-59 & n.26 (5th Cir. 1981(, cert. denied, 456 U.S. 915 (1982); United States v. Kennington, 650 F.2d 544, 546 (5th Cir. 1981) ("'The statute on which an indictment is founded is to be determined from the facts charged in the indictment, and the facts pleaded may bring the offense within one statute, although another statute is referred to in the indictment.'" (citation omitted)). The facts charged in the indictment clearly put the defendant on notice as to the nature of the charges against him.

4. The petitioner argues that he was prejudiced because he would not have pleaded guilty if he had known that he was charged with the wrong statute. The discussion, supra, demonstrates the specious nature of this assertion. Simply stated, Moore's "recognition" that he was charged with the wrong statute would have changed nothing. Moore was fully informed of the true elements of the crime with which he was charged, and therefore, the indictment would not have been dismissed. See Fed. R. Crim. P. 7(c)(3) ("Error in the citation or its omission shall not be ground for dismissal of the indictment . . . .").

5. For the same reason—the lack of prejudice to the defendant—Hundley's failure4 to advise Moore of this defense cannot be the basis for a claim of ineffective assistance of counsel.

6. Moore's present argument that his fifth and sixth amendment rights were violated through the government's taping of his conversations also fails to form the basis for a claim of

ineffective assistance of counsel.

7. For there to have been a violation of Moore's fifth amendment rights, he would have to have been in custody at the time of the interrogation. See, e.g., Minnesota v. Murphy, 465 U.S. 420, 429-30 (1984); Miranda v. Arizona, U.S. 436, 444 (1966); see also Illinois v. Perkins, 110 L. Ed. 2d 243, 250-51 (1990) ("Conversations between suspects and undercover agents do not implicate the concerns underlying Miranda. The essential ingredients of a 'police-dominated atmosphere' and compulsion are not present when an incarcerated person speaks freely to someone that he believes to be a fellow inmate."). There is no suggestion that Moore was in custody. There was no restriction whatsoever on his freedom of action. In fact, he arranged the meetings at issue.

8. There is also no colorable sixth amendment claim. The taped conversations all occurred prior to Moore's indictment. As such, his sixth amendment right to counsel had not yet attached. See In re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 244 (2d Cir.) (en banc) ("During the grand jury investigation of an unindicted target, the Sixth Amendment right to counsel does not attach."), cert. denied, 475 U.S. 1108 (1986); see also Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion) (The right to counsel attaches "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.").

9. The petitioner's reliance on Disciplinary Rule 7-104(A)(1), Code of Professional Responsibility, is also unavailing. See United States v. Ryans, 903 F.2d 731-32, 739 (10th Cir.) ("We agree with the majority of courts which have considered the question that DR 7-104(A)(1) was not intended

to preclude undercover investigations of unindicted suspects merely because they have retained counsel."), cert. denied, 112 L. Ed. 2d 118 (1990).

Let the Clerk send a copy of the Findings of Fact and Conclusions of Law and the accompanying Final Order to the petitioner and all counsel of record

DATE UNITED STATES DISTRICT JUDGE

Footnotes

1 If Hundley had recommended that Moore not plead guilty based on any of these arguments, and Moore then faced an indictment with additional charges, the expense of a trial, and a potentially much heavier sentence, one might well assume that Moore would now be arguing that counsel's advice not to plead guilty amounted to ineffective assistance of counsel. The sixth amendment does not exist to provide the defendant with the opportunity to adopt alternative strategies—to pursue one strategy during the direct case, and then, if dissatisfied with the result, adopt the alternative strategy through a collateral challenge. The strategy adopted by Hundley was very reasonable under the circumstances. Moore may not now relitigate based on his dissatisfaction with the eventual effectiveness of that strategy.

2 Moore's essential argument is that he is innocent of all counts, but, that for tactical reasons, on Hundley's strong advice, he decided to plead guilty. Assuming, arguendo, that this is true, it is difficult to see how additional investigation by Hundley would have charged this calculus. Moore was at all times in possession of all the allegedly exculpatory information, and it was Moore who ultimately decided to

plead guilty. This, he had all the information necessary to evaluate the costs and benefits of pleading guilty. It is also worth noting that Moore is not, by any stretch of imagination, an unsophisticated defendant. His present assertion of total, unquestioning reliance on Hundley's advice is simply not credible.

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3 Moore has placed a great deal of weight on Hundley's admitted "coaching" of Moore. Moore would apparently have the Court believe that this demonstrates that Moore is really innocent and was coerced into pleading guilty. The Court finds it difficult to believe that an individual of Moore's experience and sophistication was coerced into pleading guilty against his will. Moore may have been convinced to make a decision he now regrets, but this is a far cry from being coerced or overborne into making an involuntary or unknowing plea. Further, the defendant's interpretation of the "coaching" is not very persuasive. It is much more likely that Hundley coached Moore for fear that Moore would lie at the Rule 11 hearing and defeat the plea bargain that Hundley believed to be in his best interest. After all, Hundley had been faced with Moore's continual assertions of innocence only to have those assertions refuted by the tapes—tapes which not only tended to show obstruction of justice, but that Moore had committed other crimes as well.

4 This is not to say that it was objectively unreasonable for Hundley not to have raised the argument. The argument represented by United States v. Masterpol, 940, F.2d 760, 762-63 (2d Cir. 1991), was not established law at the time of Moore's plea.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 24, 1993

No. 92-6419
CR-90-78
CA-91-797

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

ARCH A. MOORE, JR.
Defendant - Appellant

.....

On Petition for Rehearing with Suggestion for
Rehearing In Banc

.....

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No.2-90-00078
	)	
ARCH A. MOORE, JR.,	)	
Defendant	)	

AFFIDAVIT OF WILLIAM G. HUNDLEY

I, William G. Hundley, being duly sworn, hereby state the following to be true and correct:

1. I am counsel for the defendant, Arch A. Moore. I have represented him in connection with the matters currently before the Court.

2. In the course of this representation, I learned that on January 8, 1990, the government tape-recorded and video-taped a meeting between Mr. Moore and John Leabury, his 1988 campaign manager. On January 9, 1990, they recorded a telephone conversation between Mr. Moore and Mr. Leabury.

3. On January 10, 1990, pursuant to a prearranged agreement between me and the prosecutors, the government conducted an all day interview of Mr. Moore with counsel in the United States Attorney's office in Charleston, West Virginia.

4. After the interview was concluded the government recorded another telephone conversation between Mr. Moore and Mr. Leabury on January 11, 1990.

5. I had no knowledge of the meeting on January 8 or the telephone calls on January 9 and 11, or of the fact that they were

recorded.

6. After the January 10 interview, Mr. Moore received a target letter offering him an opportunity to appear before the Grand Jury. Upon my advice, Mr. Moore declined to appear before the Grand Jury.

7. My client and I did agree to a further interview by the government on "new matters" uncovered by the government since the January 10 interview. This interview was conducted on April 9, 1990, in the United States Attorney's office in Charleston, West Virginia.

8. At the conclusion of the April 9 interview, Mr. Moore was excused and I was advised by the government for the first time of the Moore/Leabury recordings of January 8, 10, and 11. I requested an opportunity to listen to these tapes. The government agreed to play the tapes for me, but not for Mr. Moore. This was done April 11, 1990, in Charleston. According to the government, as I was listening to the tapes, the Grand Jury was sitting in Charleston ready to return its indictment against Mr. Moore. After listening to the tapes and talking to my client, I began plea bargaining negotiations with the government. The government took the very strong position that, in addition to obstruction of justice as evidenced by the tapes, Mr. Moore would have to plead to extortion, mail fraud and two (2) tax counts; otherwise, that same day the Grand Jury was going to return, to my recollection, a 28 count indictment including RICO and other unspecified charges. Mr. Moore expressed strong reservations to me about Counts 1, 2, 3, and 4. I conveyed these concerns to the government. However, when the government agreed to structure the indictment so that the obstruction of justice Count was the only Count within the Sentencing Guidelines, I strongly advised Mr. Moore to agree to the terms

of the plea agreement.

9. I then requested the government to delay the Grand Jury's action until at least Friday, April 13 so that my client and I could have time to discuss this important decision in detail and without undue pressure. When the government refused and said that the morning of April 12 was our deadline, I signed the plea agreement and strongly advised Mr. Moore to do so. The next morning he advised me that he would follow my advice and sign the agreement. This is why the dates of my signature and Mr. Moore's signature are different, as the Court noted at the time of plea.

10. Prior to entry of the plea, I agreed that the government could submit to the Court a written statement of the evidence the government would present to prove the charges in the indictment in lieu of oral allocation at the plea. It was not until 10:00 p.m. the night of May 7, the night before the plea, that the government presented me with a 26 page statement of purported facts plus exhibits and transcripts of the recorded Moore-Leabury January 8 meeting which it intended to submit to the Court. I advised the government that the statement was full of purported facts to which Mr. Moore would never agree and, unless the government withdrew the statement and made a simple, short oral allocation at the plea, I was going to request a meeting with the Court the next morning to inform the Court that there would be no plea. The government agreed not to submit the statement and, again, upon my advice Mr. Moore went ahead and entered the plea on May 8, 1990.

11. Because of the lateness of the hour on May 7 that the government's statement of evidence was submitted to me and the anxiety and pressure he was undergoing because of the impending plea the next morning, Mr. Moore really did not have

an opportunity to absorb the contents of that statement before, on my advice, he entered the plea the following day. If he had, in my opinion, he would not have pleaded guilty.

12. Since that time, Mr. Moore has repeatedly pointed to the statements of government witnesses in the government's statement of fact which pertain to Counts 1 through 4 and which he vehemently states are not true, i.e. he denies that he ever extorted under color of right, or in any other manner, anything from Paul Kizer, an immunized government witness. He vehemently denies Kizer's version of the extortion Count. Tending to corroborate his view of Mr. Kizer is a recently reported press interview of Mr. Kizer where Mr. Kizer says Arch Moore promised him a pardon for a $50,000 political contribution on October 20, 1988, the very date Kizer had two $50,000 checks sent to the National Republican Committee. On October 19, 20, and 21, 1988, Mr. Moore was campaigning throughout West Virginia and, by all accounts, was never in his office where Mr. Kizer says the pardon was promised in return for the $50,000 contribution.

13. During a recent interview with numerous federal agents in line with our plea agreement to cooperate with the government, Mr. Moore told the agents he never really received the $50,000 campaign contribution from Mr. Smith as alleged in the indictment.

14. All of this has led me to the inescapable conclusion that Mr. Moore only pleaded guilty to Counts 1 through 4 because of the threat of a much broader indictment, the impact which the Leabury tape had on me, and the strong advice I gave him to enter the plea.

15. Justice and fairness will best be served by giving Mr. Moore his day in court. There is no prejudice to the government

because, according to the prosecutors, they had the 26 Count indictment ready to be voted on and handed up on April 11. We have signed every waiver of the statute of limitations the government has requested and will sign any others requested if necessary.

_____

William G. Hundley

Sworn to and subscribed before me
this _____ day of June, 1990.

_____

Notary Public

My commission expires:_____

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED STATES OF AMERICA

V. Criminal No. 2:90-00078

ARCH A. MOORE, JR.,
Defendant.

SECOND AFFIDAVIT OF WILLIAM G. HUNDLEY

1. It is true, as the government claims in its affidavits, that I knew in at least March, 1990 that the government was going to seek an indictment of Mr. Moore, and, in a general way, the charges that were being considered. What I did not know, and what was consciously being concealed from me until the appropriate time, was that obstruction of justice was involved, and that the government had two witnesses who had recorded my client. In fact at one of the Justice Department conferences in March, 1990, in Washington, D.C. at which all of the prosecutors were present, the Deputy Chief of the Public Integrity Section, Lee Radik, asked me if I had given any thought to plea bargaining. When I responded that, in all my conversations with the prosecutors, I had not yet heard anything that would cause me to consider a plea, nobody from the government's side responded.

2. At the time of the April interview, I did not know that an indictment had been authorized. The interview of Mr. Moore on April 9 lasted from approximately 1:30 p.m. to 3:30 p.m. At the conclusion of the interview the prosecutors asked if they could

speak with me alone. They then told me that they had tapes of Mr. Moore obstructing justice with Mr. Leabury on January 8, 9 and 11, and that they also had recordings of Kizer conversations with my client. They told me what was on the Leabury tapes, but were vague about the contents of the Kizer recordings except that they incriminated my client. They invited me to plea bargain, but I told them I wanted to listen to the tapes first. They would not agree to that. Contrary to the government's assertions, there was no plea bargaining on April 9. When they would not agree to let me hear the tapes, I left the U. S. Attorney's Office with Mr. Moore and conveyed to him what the prosecution told me. I told Mr. Moore I was going back to Washington to request that I be permitted to listen to the tapes. I left Charleston for Washington, D.C on an evening flight on April 9.

3. The next day, April 10, I contacted the Deputy Chief of the Public Integrity Section, Mr. Lee Radik in Washington, D. C. and he agreed to make arrangements in Charleston for me to listen to the tapes. That same day, Mr. Savage called me from Charleston and I asked him what Mr. Moore would have to plead in addition to obstruction of justice. When he said RICO, I categorically rejected the offer. Later in the day, Mr. Campbell called from Charleston and said Mr. Moore would not have to plead to RICO, but the government would want extortion, mail fraud, and tax counts in addition to the obstruction count. I agreed to discuss that after I listened to the tapes. Contrary to the government's assertion, there was no plea bargaining on April 10, because I was in Washington, D. C. seeking permission to listen to the tapes.

4. I flew back to Charleston the morning of April 11. When I arrived at the U. S. Attorney's Office, the news media was there in force. Mr. Carey informed me that the Justice Department's

Public Information Office had issued a statement that something very newsworthy was going to happen that day in Charleston. That was the first I knew that the government planned to return its indictment that day, April 11. As per Mr. Radik's word, they did let me listen to the Leabury tapes of January 8, 9 and 11. They gave me some reason why they did not have the Kizer tapes there which I honestly do not recall. After listening to the Leabury tapes I did begin, for the first time, to plea bargain. I was told it would have to be an indictment rather than information and would have to include five counts. They did agree to make Count 5 the only guideline offense, and to put certain things in the plea agreement that I had requested, i.e., that they would make no specific recommendation to sentence. I did not get any paper over to my client until late that afternoon. Because of the lateness of the hour, the government advised me that they had sent the grand jury home and were bringing them back at noon the following day. It was at that time that I asked the government to delay the indictment until April 13, one day, to give me and my client a little more time to reach a decision. I was told they did not want to bring the grand jury back on Good Friday, and that my deadline was noon on April 12. The Statute of Limitations was never mentioned and was never a factor. I would have given them any waiver they wanted.

I did convey to the prosecution at that time my client's reservations about Counts 1 through 4, particularly the mail fraud and extortion counts. I do remember Mr. Campbell, at my request, outlining the government's evidence on the extortion count and the discussions that, even if it was bribery by Kizer,

it was covered under the Color of Right extortion theory. While I am not denying that I was impressed with the evidence, I never told Mr. Campbell or any of the other prosecutors that Mr. Moore was admitting all this to be cause he was not. I also understood the government's theory on Count I, that since the underground campaign funds were cash and unreported and illegal under West Virginia law, this could be strained and stretched to constitute a mail fraud. While I was not overwhelmed with this theory, I accepted it.

By late evening April 11, I was satisfied with the government's theories and evidence on Counts 1 through 4 and strongly advised Mr. Moore to sign the plea agreement. I told him I was not happy with the plea agreement, but it was clearly the lesser of the two evils from which we had to choose. He signed it late the next morning.

5. The cracks in the plea agreement began to surface shortly thereafter. As Mr. Savage states in his affidavit (p.4 par. 9), shortly after the plea agreement was executed, the government interviewed Mr. Moore in line with the Cooperation Agreement preparatory to his testifying as a government witness in the Ellis case. Mr. Savage treats Mr. Moore's "problems" with Counts 1 through 4 rather lightly in his affidavit, but following this meeting, Mr. Savage called me in Washington, D. C. to tell me that my client was not admitting anything except the obstruction of justice. I went to Charleston, as he suggested, and asked him to outline in detail the evidence the government had on the $50,000 cash Marrowbone contribution, which he did (p. 4, par.8 Savage affidavit) and which I found convincing. I conveyed this to Mr. Moore with my observation that the government had convincing corroborated evidence of the transaction.

I did then tell Mr. Savage that I thought the problem was resolved. Moore did then testify in the Ellis case and Mr. Savage told me he was a truthful witness and that he would so advise the Court at sentencing.

6. As to the events of the night of May 7, Mr. Savage's affidavit omits the fact that I told him most vehemently that there were a lot of purported facts in that statement of evidence that my client would never admit and that, unless it was withdrawn, there was not going to be any plea. I was very upset and very serious. Mr. Savage said he would convey my objections to his supervisors, but he could not make any commitment that at this late date it could be withdrawn. At 8:30 a.m. on May 8, I spoke to Mr. Campbell who said that, in view of my strong objections to the statement, they would not submit it to the Court, but would make a brief oral allocation as I had suggested. With that I advised Mr Moore to go ahead with the plea. At the plea itself there was, in my opinion, a long pause by Mr. Moore before he answered your Honor's question about whether his plea was the result of duress or coercion.

Rightly or wrongly, I reacted to the government's statement of evidence the way I did on the night of May 7 because I was trying to save the plea which I had strongly recommended and which I felt was in my client's best interest. What I should have done is gone to your Honor the morning of May 8 with the government and, just as I have in this affidavit, laid out these problems. I regret that I did not.

7. The whole matter came to a head again when Mr. Moore was interviewed in my presence by the federal agents and Assistant U. S. Attorney Larry Ellis at the end of May, but not for the reasons stated in the government's papers. During the

course of this interview, Mr. Moore again stated that he never received the $50,000 Marrowbone money which is really at the heart of one of the tax counts. I stopped further questioning on the indictment and told Mr. Ellis of my concern with the plea.

There followed a series of meetings with Mr. Moore trying to put together the defendant's version of the offense for the pre-sentence report. Mr. Moore would not accept responsibility for Counts 1 through 4 because he said he was not guilty of these offenses.

Mr. Savage did call me in early June as he states (p. 5, par.12 Savage Affidavit) and told me that he was going to advise the Court at sentencing that my client was not cooperating with the government and interestingly "had not accepted responsibility." (p. 6, par.12). I asked Mr. Savage what he would say about Mr. Moore's testimony in the Ellis case. He said he would tell the Court he gave truthful testimony in that case.

The fact that Mr. Savage told me he was going to advise the Court that, in his opinion, Mr. Moore was not cooperating with the government played no part in the decision to file this motion to withdraw the plea.

8. In view of Mr. Moore's adamant position on Counts 1 through 4 (I had promised Mr. Kuklar our version of the offense the second week in June) I told Mr. Moore in Mid-June to give serious thought to whether he wanted to file a motion to withdraw the plea. I told him I would file the motion if he so desired. We agreed to meet June 19 to make a final decision. I called Mr. Campbell to alert him that a motion to withdraw was being contemplated. The decision to file was reached June 19.

9. I have set out these facts in such detail under oath because I believe that, in toto, they provide fair and just reasons to withdraw these guilty pleas. There are, as I have stated, some

things that I wish I had done differently. I believe my client was always troubled and uncertain about the guilty plea to Counts 1, 2, 3 and 4. I have been a criminal defense attorney since I left the Justice Department in 1966. This is the first time I have ever filed a motion to withdraw a guilty plea.

/s/ William G. Hundley

Sworn to and subscribed before me this 9th day of July, 1990.

/s/ Audrey C. Toler
Notary Public

My commission expires: September 20, 1997.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,
Plaintiff,

vs.

ARCH A. MOORE, JR.,
Defendant.

CRIMINAL ACTION NO.
2:90-00078

Proceedings had in the sentencing hearing of the above-styled action before Honorable Walter E. Hoffman, Judge, on Tuesday, July 10, 1990, commencing at 9:30 a.m. at Charleston, West Virginia.

.....

THE COURT: And this is a car of what you tried to slip in improperly, you and Mr. Ellis to me. Now, I'm not interested in all of Mr. Moore's sins. You have charged him with five sins. Stick to that

.....

CERTIFICATE

I, Jennifer Vail-Kirkbride, Registered Professional Reporter and Official Reporter of the United States District Court, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the above-styled action on the 9th day of July, 1990, as reported by me in stenotypy.

I certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Given under my hand this 25th day of July, 1990.

/s/_____
Official Court Reporter
United States District
Court

THE CHARLESTON GAZETTE
Wednesday - May 9, 1990

MOORE ENTERS GUILTY PLEAS TO FIVE CHARGES

.....When he was asked by the Judge how he would plead to the first count of the indictment, Moore said, "Your honor" and paused and looked down. "My plea is guilty," he said after several seconds.

.....Moore paused for a second time after Hoffman asked him if he was threatened in any way to plead guilty to the charges. "No," Moore said after several seconds hesitation.....

AP statewide confirms coverage.

AFFIDAVIT OF TROY B. CONNER, JR.

I, Troy B. Conner, Jr., having been duly sworn, do hereby state as follows:

1. I am an attorney admitted to the bars of the State of West Virginia and the District of Columbia. I have known William G. Hundley for over 30 years.

2. I met with two other lawyers and Mr. Hundley on April 8, 1991 to discuss the status of the cases involving Arch A. Moore, Jr. During this meeting, Mr. Hundley discussed all aspects of the cases in very general terms.

3. Regarding the question of Mr. Moore's withdrawal of his guilty plea, Mr. Hundley stated that he had been "dead wrong" on the new rules and he had not become familiar with the new rules until after he decided to file a motion to withdraw the plea. Mr. Hundley stated that his efforts, after entry of the guilty pleas, in the Moore case were directed toward "trying to save the plea."

4. On the question of his knowledge of how long Mr. Moore would spend in jail under the plea agreement, Mr. Hundley stated he had "never read the guidelines." In a later meeting with Mr. Hundley on July 8, 1991, with the same counsel, he changed his story to state "I know them inside out."

5. Regarding Mr. Hundley's statement in his most recent and third affidavit that he told Mr. Moore's attorneys "everything that is contained in this affidavit," I have reviewed it and he did not, to my knowledge, tell Mr. Moore's current lawyers all the representations he makes in the affidavit.

/s/ Troy B. Conner, Jr.

8/19/91
Dated

SWORN AND SUBSCRIBED TO BEFORE ME THIS 19TH DAY OF AUGUST, 1991

Jill Seule Negley
Notary Public

My commission expires: July 31, 1993

AFFIDAVIT OF DR. A. THOMAS McCOY

After first being duly sworn, Dr. A. Thomas McCoy hereby deposes and says:

1. I am a physician and had a residence in Charleston, West Virginia in 1990.

2. On April 11, 1990, Governor Arch A. Moore, Jr. stayed with me, his wife being in Florida. He arrived at my house at approximately 8:30 p.m. - 9:00 p.m.

3. Arch explained that he had learned that afternoon from his lawyer, William Hundley, that the government planned to indict him. The government wanted him to sign a plea agreement to plead guilty to five counts, the last involving obstruction of justice. He said that Count Five was based upon a taped conversation between himself and John Leaberry. Arch stated that he had been advised that if he pled guilty to obstruction of justice, sentences on all else would dove tail. He said, "I would be out in six months."

4. Arch was deeply upset and could not decide what to do. He was deeply concerned at the badgering the government had subjected his wife and family to.

5. Arch outlined the charges to me and said that he was not guilty of the first four counts. He said Hundley told him to accept the plea agreement because Hundley said he had never won a case where a taped conversation was involved. He said that Hundley told him "wire cases beat you."

6. With regard to the charges brought by Mr. Kizer, Arch stated, "I earned those fees." Arch wanted me to know that to let his friends know that he was innocent. He repeated several times that if he were to plead guilty to obstruction of justice he would

only be separated from his wife, Shelley, and his family for six months.

/s/ Dr. A. Thomas McCoy

7/31/91
Dated

SWORN AND SUBSCRIBED TO BEFORE ME THIS 31ST DAY OF JULY, 1991

Notary Public

My commission expires: May 9, 2000

AFFIDAVIT OF SHELLEY RILEY MOORE

I, Shelley Riley Moore, being duly sworn affirm:

1. I am the wife of Arch A. Moore, Jr., the defendant in the case styled as United States v. Arch A. Moore, Jr., Criminal No. 2:90-00-78.

2. William G. Hundley, Esq. represented my husband in this matter from 1989 until the spring of this year. I was present at several meetings with Mr. Hundley at which Mr. Hundley advised us about the case.

3. At one such meeting, Mr. Hundley assured us that Counts One, Two, Three and Four of the indictment against my husband were "nothing to worry about." Subsequently, Mr. Hundley gave us similar assurances.

4. Mr. Hundley similarly assured us that there was no need to be concerned about any civil action being brought against my husband by virtue of his conviction.

5. The foregoing is true and correct to the best of my knowledge.

/s/ Shelley Riley Moore
Shelley Riley Moore

SWORN AND SUBSCRIBED TO BEFORE ME THIS 15TH DAY OF AUGUST, 1991.

/s/ ANGELA R. BEE
Notary Public

My commission expires: July 26, 1993

U. S. Department of Justice
United States Attorney
Southern District of West Virginia

July 5, 1990

Honorable Walter E. Hoffman
Senior District Court Judge
425 U. S. Courthouse
U. S. Post Office & CourthouseNorfolk, Virginia 23510

Re: United States v. Arch A. Moore, Jr.
Criminal No. 2:90-00078 (USDC SD/W Va)

Dear Judge Hoffman:

Enclosed please find a copy of the United States' Sentencing Memorandum in the above-captioned case. Due to the length of the Memorandum, we felt it was appropriate to make it available to the Court well in advance of the sentencing hearing, in order to provide the Court with a sufficient opportunity to read it. We are filing this Memorandum with the Court for your consideration in conjunction with the pre-sentence report.

Service has been made upon opposing counsel. It is customary in this District to publicly file these pleadings, but in light of the pending motion to withdraw, the original Memorandum and an accompanying Motion to Seal has been filed with the Clerk. The Clerk has been requested to await instructions from the Court as to the sealing. The United States will move that the Memorandum be unsealed at an appropriate time at or prior to sentencing, should sentencing proceed as currently scheduled for July 10, 1990.

In the Memorandum, the United States makes reference to certain tape-recorded conversations between the defendant and John Leaberry. Transcripts and the actual tape-recordings are available for the Court's review upon request.

Very truly yours,

Michael W. Carey
United States Attorney
/s/ Larry R. Ellis
LARRY R. ELLIS
Assistant United States
Attorney

LRE/ljw
Enclosure
cc: William G. Hundley, Esquire

U. S. DEPARTMENT OF JUSTICE
United States Attorney
Southern District of West Virginia

April 12, 1990

William G. Hundley, Esquire
Akin, Gump, Strauss, Hauer and Felt
1333 New Hampshire Avenue, N. W.
Washington, D. C. 20036

Re: Arch A. Moore, Jr.

Dear Mr. Hundley:

This will confirm our conversations with regard to your client, Arch A. Moore, Jr., (hereinafter "Mr. Moore"). As a result of these conversations, it is agreed by and between the United States and Mr. Moore as follows:

1. Mr. Moore expressly waives the statute of limitations and any rights provided by Title 18, United States Code, Section 3282. Mr. Moore expressly acknowledges by this waiver that he will not assert statute of limitations or Title 18, United States Code, Section 3282, as a defense to any charge ultimately prosecuted concerning offenses committed during the time period from December 1, 1984 should this agreement become void due to violation of any of its terms by him.

2. It is anticipated that one or more indictments will be presented to a federal grand jury in this district charging Mr. Moore, and perhaps others, with violations of certain federal laws. The Office of the

United States Attorney for this district will present such indictment or indictments to that grand jury, which will name Mr. Moore as a defendant in five counts charging Mr. Moore as follows:

A. One count of violation of Title 18, United State Code, Section 1341 (mail fraud);

B. One count of violation of Title 18, United States Code, Section 1951 (extortion);

C. Two counts of violation of Title 26, United States Code, Section 7206(1) (filing a false tax return);

D. One count of violation of Title 18, United States Code, Section 1503 (obstruction of justice)

and as an unindicted co-conspirator and unindicted aider and abettor in appropriate subsequent additional counts and additional indictments.

3. In the event that the grand jury returns a true bill of indictment, Mr. Moore will plead guilty to those counts which will charge him, and perhaps others, with violations of the federal criminal statutes referred to in paragraph 2 above.

4. The statutory maximum penalty to which Mr. Moore will be exposed per violation in the Southern District of West Virginia by virtue of his pleas of guilty as stated in paragraph 2 are:

A. Title 18, United States Code, Section 1341 (mail fraud): imprisonment for a period of five (5)years and a fine of $250,000, or not more than twice the gross pecuniary gain realized by Mr. Moore or not more than twice the gross pecuniary loss to another as a result of the offense, or both such fine and imprisonment;

B. Title 18, United States Code, Section 1951 (extortion): imprisonment for a period of twenty (20) years and a fine of $250,000, or not more than twice the gross pecuniary gain realized by Mr. Moore or not more than twice the gross pecuniary loss to another as a result of the offense, or both such fine and imprisonment;

C. Title 26, United States Code, Section 7206(1) (filing a false tax return): imprisonment for a period of three (3) years for each of the two counts and a fine of $250,000 or not more than twice the gross pecuniary gain realized by Mr. Moore or not more than twice the gross pecuniary loss to another as a result of the offense, or both such fine and imprisonment.

D. Title 18, United States Code, Section 1503 (obstruction of justice): imprisonment for a period of five (5) years and a fine of $250,000 or not more than twice the gross pecuniary gain realized by Mr. Moore or not more than twice the gross pecuniary loss to another as a result of the offense, or both such fine and imprisonment;

for a total exposure of thirty-six (36) years and a total maximum fine of the combined maximum for each of the five counts, plus costs of prosecution as to the tax offenses. Mr. Moore is subject to a maximum term of supervised release of three (3) years. In addition, Mr. Moore will be subject to the provisions of the Victim and Witness Protection Act of 1982, and criminal assessment pursuant to Title 18, United States Code, Section 3013. The $250 criminal assessment will be paid in full to the Clerk at the time Mr. Moore is sentenced.

5. Mr. Moore will be completely forthright and truthful with this office and federal state and local law enforcement agents with regard to any inquiries made of him. In addition, Mr. Moore will give signed, sworn statements, grand jury testimony and trial testimony relative thereto, if same are deemed necessary. During any interviews conducted pursuant to this agreement, except appearances before the grand jury, Mr. Moore may have counsel present if he desires.

6. Mr. Moore will work with representatives of the Internal Revenue Service for the purpose of: (a) determining (by taxable period) the total net income and taxable income derived by him as a result of his activity which resulted in this plea agreement for the calendar years 1984 through the present; (b) filing correct federal income tax returns for the calendar years 1984 through the present, if due; (c) amending existing returns on file for the calendar years 1984 through the present, if due; (d) amending existing returns on file for the calendar years 1984 through the present to include the net income and taxable income determined in item (a); and (e) paying all taxes determined to be due

and owing to the fullest extent possible. Mr. Moore agreed that he will file correct federal income tax returns, if due or amend existing returns on file within a reasonable period of time from the Court's acceptance of this agreement. Mr. Moore will agree to the release of all tax-related information obtained by the United States Attorney's Office during the course of this investigation to civil representatives of the Internal Revenue Service.

7. Mr. Moore hereby agrees to make restitution as ordered by the Court in accordance with the provisions of the Victim and Witness Protection Act of 1982, Title 18, United States Code, Section 3579-3580, and any other applicable federal law, relating to restitution rights of victims of crimes.

8. Nothing contained in any statement or testimony given by Mr. Moore pursuant to this agreement or any evidence developed therefrom will be used against him in any further criminal prosecutions or in determining the applicable guideline range under the Federal Sentencing Guidelines unless this agreement becomes void due to violation of any of its terms by him. However, nothing contained in this agreement restricts the use of information obtained by the United States from an independent, legitimate source, separate and apart from that information and testimony being provided by the defendant pursuant to this agreement, in determining the applicable guideline range, nor does this agreement prevent Mr. Moore from being prosecuted for any violations of federal and state laws he may have committed should evidence of any such violations be

obtained from any such independent, legitimate source. In addition, this agreement does not prevent the United States from prosecuting Mr. Moore for perjury or the giving of a false statement to federal agents, if such a situation should occur by virtue of his failing to be fully forthright and truthful pursuant to paragraph 5 herein.

9. There have been no promises or representations whatsoever made to Mr. Moore by the United States or any of its agents as to what the final disposition in this matter will be. It is understood that the matter of sentencing is within the sole discretion of the Court and the United States will make no recommendation as to a specific sentence. However, the United States retains the right to inform the probation office and the Court of any relevant facts, to address the Court with respect to the nature and seriousness of the offense, to respond to any questions raised by the Court, to correct any inaccuracies or inadequacies in the presentence report and to respond to any statements made to the Court by or on behalf of Mr. Moore.

10. At final disposition, the United States will advise the Court of the nature and extent of Mr. Moore's forthrightness and truthfulness, or failure to be forthright and truthful, and ask the Court to give same such weight as the Court deems appropriate. The United States will also advise the Probation Department and the Court of the nature and extent of Mr. Moore's recognition and affirmative acceptance of personal responsibility for his criminal conduct, or his failure to do so. The United States and Mr. Moore understand and agree that the Court has the sole discretion to determine whether the defendant has adequately accepted responsibility.

11. The conviction and final disposition of Mr. Moore, pursuant to his plea of guilty to the indictment, and his fulfilling each of his responsibilities as set forth in the above ten (10) paragraphs of this agreement will conclude the prosecution in the Southern District of West Virginia of Mr. Moore by the United States for violations of Title 18 and Title 26 committed prior to the date of the execution of this agreement.

12. If either the United States or Mr. Moore violates any of the terms of this agreement, the other party will have the right to void this agreement. If the Court refuses to accept the terms of this agreement, it shall be void.

13. This written agreement constitutes the entire agreement between the United States and Mr. Moore in this matter. There are no agreements, understandings, or recommendations as to any other pending or future charges against Mr. Moore in any court other than the United States District Court for the Southern District of West Virginia.

Very truly yours,

MICHAEL W. CAREY
United States Attorney

By: /s/ Larry R. Ellis
Larry R. Ellis
Assistant United States Attorney

NANCY C. HILL
Chief, Criminal Division

/s/ Joseph F. Savage, Jr.
Joseph R. Savage, Jr.
Assistant United States
Attorney

/s/ John M. Campbell
John M. Campbell
Trial Attorney
U. S. Department of Justice
Public Integrity Section

/ljw

As evidenced by my signature at the bottom of the seven (7) pages of this letter agreement, I have read and understand the provisions of each paragraph herein, and, hereby, fully approve of each provision.

/s/ Arch A. Moore, Jr.
Arch A. Moore, Jr.
Defendant

4/12/90
Date Signed

/s/ William G. Hundley
William G. Hundley
Attorney for Defendant

4/11/90
Date Signed

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT
OF WEST VIRGINIA
MARTINSBURG DIVISION

THE UNITED STATES OF AMERICA, PLAINTIFF, V. ARCH A. MOORE, DEFENDANT.	DOCKET NO.90-00078 U.S. DISTRICT COURTHOUSE 225 WEST KING STREET MARTINSBURG. WV 25401 JANUARY 7, 1992 9:30 A.M.

EVIDENTIARY HEARING TRANSCRIPT
BEFORE THE HONORABLE RICHARD L. WILLIAMS
UNITED STATES DISTRICT JUDGE

See Pages 63-66

SHELLEY RILEY MOORE,

Called as a witness, having been first duly sworn by the clerk, was examined and testified on her oath as follows:

THE COURT: Mr. Wehner, since her evidence will be cumulative to a point, if you just want to put a question to her that did she hear the testimony of Governor Moore on certain points, and if that is her recollection of it, I will accept that.

MR. WEHNER: Thank you, your Honor.

THE COURT: All right.

MR. WEHNER: There is one specific incident —

THE COURT: All right. I understand. On anything that is outside of his testimony, I want you to bring out from her directly.

MR. WEHNER: Yes, sir. Thank you, your Honor.

DIRECT EXAMINATION

BY MR. WEHNER:

Q. Mrs. Moore, would you please open the exhibit book in front of you to exhibit Number 18. Do you recall seeing that newspaper article on or about May 8, 1990?

A. Yes, sir, I do.

Q. And what are the circumstances under which you saw that newspaper article?

A. I had gone down to Charleston with Arch, and, as was my practice, I read Charleston papers that we did not receive at our home, and I sort of caught up with —

THE COURT: Home at this time was Moundsville? -

THE WITNESS: Yes, sir.

THE COURT: All right.

THE WITNESS: And it was the morning of — well, the night before, we knew we were going in pleading not guilty because of this 28-page document that the government had decided should go public and go into the record. Mr. Hundley had objected to that and said that because of that we are not going to plead guilty on the next morning.

However, when I went into Arch's office, and a phone call had come through indicating that we would, again, be pleading guilty by way of the phone call, I had been reading this article concerning Senator Tonkovich, and it suddenly jumped out at me concerning this article that Senator Tonkovich has been sentenced to five years for an extortion charge involving $10,000.

So as Bill came by my chair to come into the office, I stopped him and I said, "Bill, This really worries me." I said. "Here is a man who has been given a five year sentence in an extortion charge involving $10,000, and yet my husband is about to plead guilty to —" and I will interject this knowing it to be true, is not guilty of it, but he is going to be pleading guilty to an extortion charge involving $500,000. "How can we expect six months if this is on the books here?"

Oh, he says, "Don't worry about that. Those charges — You don't even have to think about them. Just forget those." To show you my explicit confidence and explicit feeling that this man was giving us his correct advice, I forgot it. Don't worry about it. Why should I worry about things that he says I shouldn't worry about?

And I am not a legal-eagle, but that did jump out at me. So when he said that to me, I forgot about it. I just thought, well, I guess he knows what he is saying. He knows legally something I don't know. And that is exactly what I did.

BY MR. WEHNER:

Q. Was anyone else present in that conversation between you and Mr. Hundley?

A. No, sir.

Q. Directing your attention to the evening of July 9, 1990, were you present in your daughter Lucy's home during a T.V. broadcast that Governor Moore referred to in earlier testimony?

A. Yes, I was.

Q. Did you overhear the Governor's end of the telephone conversation with Mr. Hundley?

A. I did.

Q. And, to your knowledge, what the Governor has testified to on direct was, in fact, what he said to Mr. Hundley and what

he told you and Lucy after the conversation took place?

A. Exactly.

MR. SAVAGE: Nothing further, your Honor.

THE COURT: Any cross examination, Mr. Savage?

MR. SAVAGE: Yes, your Honor.

CROSS EXAMINATION

By MR. SAVAGE:

Q. Ms. Moore, did you ever have a discussion with John Kuklar, the probation officer?

A. Yes, sir.

Q. And did you have a discussion about the sentence your husband was facing?.

.....

CERTIFICATE

I, Randall J. Belsvik, registered professional reporter and official court reporter of the United States District Court in and for the Eastern District of Virginia, Richmond Division, do hereby certify that the foregoing is a complete and accurate computer-aided transcription of my original stenotype notes taken in the matter of the United States of America versus Arch A. Moore, Criminal Action Number 90-00078, which was held before the Hon. Richard L. Williams, U.S.D.J. at the U.S. District Courthouse, 225 West King Street, Martinsburg, West Virginia on January 7, 1992.

I certify that the transcript fees and format comply with those prescribed by the court and the Judicial Conference of the United States.

Given under my hand this 14th day of January, 1992.

_____

Randall J. Belsvik, RPR
Official Court Reporter
United States District Court
Eastern District of

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,
Plaintiff,

vs

ARCH A. MOORE, JR.,
Defendant.

CRIMINAL ACTION NO.
2:90-00078

Proceedings had in the hearing of the MOTION TO WITHDRAW THE GUILTY PLEAS before Honorable Walter E. Hoffman, Judge, on Monday, July 9, 1990, at Charleston, West Virginia.

APPEARANCES:

On behalf of the United States of America
JOHN M. CAMPBELL, ESQUIRE
Trial Attorney, Public Integrity Section
U. S. Department of Justice

JOSEPH F. SAVAGE, JR., ESQUIRE
Assistant United States Attorney

LARRY R. ELLIS, ESQUIRE
Assistant United States Attorney

On behalf of the Defendant, Arch A. Moore, Jr.:
WILLIAM G. HUNDLEY, ESQUIRE
and
LARRY W. GONDELMAN, ESQUIRE
1333 New Hampshire Ave., N. W.
Suite 400
Washington, D. C. 20036

The defendant, ARCH A. MOORE, JR., was present in person.

. . . . . .

MR. ELLIS: Your Honor, I have a further matter. For this motion to withdraw, I would like to present the Court with the motion. An order has been signed by both parties.

THE COURT: Is that an endorsed order?

MR. ELLIS: Yes, it is.

THE COURT: Is that satisfactory, Mr. Hundley, for me to enter an order withdrawing that from the record?

MR. HUNDLEY: Yes. And I just would want to add this. Mr. Ellis made the representation to me on the phone that it was, you know, withdrawn for good, that it will not be resubmitted tomorrow or et cetera. So that is perfectly satisfactory.

THE COURT: It will be withdrawn for good as far as I am concerned. If some appellate court should call it to my attention, I have a copy and I would answer truthfully under oath or otherwise and produce what was submitted to me and which you gentleman have now agreed was inadvertently filed.

MR. ELLIS: Thank you, your Honor.

(Handing to the Court.)

THE COURT: Anything else, then, gentlemen?

MR. CAMPBELL: Nothing, your Honor.

dure, what - and I am not asking for any continuance or anything like that. I had not submitted to the presentence offer any version of our events, you know, in light of the motion I had filed. I'm going to get together with him and I'm sure I can get it to him early this afternoon - well, I'll get it to him this afternoon.

THE COURT: Well, I would be glad to have anything that you wish to present, Mr. Hundley.

MR. HUNDLEY: Or if you want, I could do it orally. The reasons why I didn't submit it were for obvious reasons, you know, if your Honor granted the motion.

THE COURT: All right, could you get it to me by 9:00 o'clock tomorrow morning?

MR. HUNDLEY: Yes sir, yes, sir. I'll get it directly to you, sir.

THE COURT: I will be here at Judge Knapp's, and get them a copy.

MR. SAVAGE; If there is any chance it is done earlier, the Government would like to get it to prepare any response to the document, assuming it requires a response.

THE COURT: If you file a response and Mr. Hundley wants to file a response to you, and here we go on the old merry-go-round.

MR. HUNDLEY: I will get it to him at 10:00 p.m. tonight.

MR. CAMPBELL: I will get it the same place you got yours.

THE COURT: Mr. Moore continues on his bond for his appearance here tomorrow morning at 9:30.(Adjourn court at 3:15 p.m., July 9, 1990.)

CERTIFICATE

I, Jennifer Vail-Kirkbride, Registered Professional Reporter and Official Reporter of the United States District Court, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the above-styled action on the 10th day of July, 1990, as reported by me in stenotypy.

I certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Given under my hand this 2nd day of August, 1990.

/s/_____
Official Court Reporter
United States District
Court

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

UNITED STATES OF AMERICA,	:
	:
V.	:CRIMINALNO.2-89-00242
	:
WILLIAM T. ELLIS,	:MAY 3, 1990
	:
Defendant.	:VOLUME 5

PARTIAL TRANSCRIPT OF JURY TRIAL
TESTIMONY OF ARCH A. MOORE, JR.
BEFORE THE HONORABLE JOHN T. COPENHAVER, JR.
UNITED STATES DISTRICT JUDGE
AND A JURY

APPEARANCES;

FOR THE UNITED STATES:	JOSEPH F. SAVAGE and LARRY R. ELLIS Assistant U.S. Attorneys Charleston, West Virginia
FOR THE DEFENDANT:	PHILLIP GAUJOT, Attorney Charleston, West Virginia FRANKLIN D. CLECKLEY, Attorney Morgantown, West Virginia

COURT REPORTER: BARBARA A. STEINKE
500 Quarrier Street
Room 5414
Charleston,
West Virginia 25301
(304) 342-1671

.....

A. I do recognize this document.
Q. What do you recognize government exhibit 37 to be?
A. This is an agreement I have with the United States Government.
Q. And in your own words and briefly, explain what you understand your obligations to be and our obligations to be.
A. My obligation under this agreement, which is dated April 12, 1990, is to respond to five counts in an indictment returned by a grand jury in the State of West Virginia. In addition -- to respond by pleading guilty to each of those counts. In addition to that, to be open, honest, and forthright with respect to my cooperation with the United States Government in any matters that I am inquired of by the United States Government or its representatives, and to again answer honestly and forthrightly any questions in any regard that are posed to me by the representatives of the government.
Q. And if you do the matters that you've just referred to, plead guilty to five charges and give truthful testimony and answers, what has the United States agreed to do for you?
A. Under this agreement, the United States Government has only indicated that they would -- would expect -- I would expect nothing in return from them. There was a suggestion that they would make no recommendation to the court that was consider-

ing my sentencing with respect to any particular regard with respect to that sentence. Other than that, sir, the United States Government made no representation to me

Q. Is it fair to say that document then indicates we won't take a position at your sentencing?

A. That is correct, sir.

Q. Does it also indicate that we would bring the nature and extent of your cooperation and truthfullness, or lack of cooperation and truthfullness, to the attention of the sentencing judge at the time of disposition?

A. It does specifically.

MR. SAVAGE: Your Honor, at this time I would offer government exhibit 37.

THE COURT: Is there any objection?

MR. GAUJOT: Same objection, Your Honor, as raised earlier.

THE COURT: That is, made with respect to other plea agreements in the case and immunity agreement?

MR. GAUJOT: Yes, sir.

THE COURT: Government exhibit 37 is admitted into evidence. Ladies and gentlemen, once again, the same instruction you've been given several times now, and that is it is not from the truth-telling obligation of the plea agreement to determine whether or not the witness is telling the truth; rather, it is from factors other than that that you would apply to any witness to make that determination.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
Charleston Division

UNITED STATES OF AMERICA,	]
	]
v.	]Criminal No.2:90-00078
	]
ARCH A. MOORE, JR.	]

ORDER

Upon consideration of the defendant's motion to withdraw his plea of guilty to each of the five (5) counts in this indictment, which pleas of guilty were heretofore entered by the defendant and accepted by the Court on May 8, 1990; the memorandum filed by the United States of America in opposition to the granting of defendant's motion; and the verbal request from counsel for the defendant to the office of the undersigned on June 27, 1990, that oral argument is desired, it is

ORDERED that the defendant, his counsel, and interested Government counsel do appear at the United States Courthouse, Charleston, West Virginia, on Monday July 9, 1990, at 1:30 o'clock p.m. to argue said motion.

In examining the defendant's memorandum in support of his motion for leave to withdraw his pleas of guilty entered on May 8, 1990, it would appear that defendant's lead attorney, William G. Hundley, was present on all occasions during plea bargaining that is now the subject of defendant Moore's asserted reasons why he should be permitted to withdraw his pleas of guilty. it is stated that, despite whatever Moore now asserts, Hundley "strongly" recommended that Moore plead guilty.

While such advice does not prove a case of ineffective counsel, it may tend to establish a prima facie case of ineffective counsel, even though the memorandum and accompanying affidavit were prepared by Hundley or an associate in his office.

If Moore now contends, or will contend in the future, that his actions in entering five (5) pleas of guilty were prompted by ineffective services of counsel, Moore should now arrange, before proceeding with his motion, to substitute counsel. Moreover, Hundley should review his actions and the statements he had made in the supporting brief and affidavit, and make a determination whether he should continue representing Moore under all the circumstances. if Moore is ultimately sentenced pursuant to the guilty pleas entered on May 8, 1990, or is granted leave to withdraw his pleas of guilty and is later found guilty and sentenced, an attack charging counsel to have been ineffective because of erroneous advice in matters in which Hundley had been an active participant would be embarrassing to Hundley, and the Court feels some obligation to dispose of this issue in advance of hearing the motion. Moore is not entitled to be heard and represented by alleged ineffective counsel for acts or failure to act on the part of his present counsel as to events leading up to the day of the hearing on July 9, 1990. If Moore wishes to change counsel, or Hundley wishes to withdraw as counsel, the Court should be immediately notified, in which event a hearing on Moore's motion will be continued for two weeks to permit new counsel to prepare and to include a specific charge of ineffective counsel. The Court has not determined that Moore is entitled to an evidentiary hearing, but may take such action after hearing argument as there appears to be certain factual disputes according to the affidavits submitted. if an evidentiary hearing is ORDERED, the same will proceed on Monday, July 9, 1990.

until concluded. Counsel signing affidavits are potential witnesses and, if they testify, arrangements should be made for other counsel to participate in the examination of the witness/attorney and argue the credibility issue of the witness/attorney. The defendant, of course, may be required to testify as to the events and conversations leading up to the entry of his pleas of guilty.

The Government has suggested that Moore's actions in seeking leave to withdraw his pleas of guilty are prompted by the Government's statement that it will recommend to the Probation Officer that Moore has not been cooperative as agreed in his executed plea agreement. Such a controversy does not give rise to the withdrawal of a guilty plea. The right exists under Rule 32(c)(3)(D), Fed. R. Crim. P., for either party to question or controvert any statement by a Probation Officer as to the cooperation, or lack of cooperation, of any defendant. The undersigned judge has not seen the presentence report and can only say that the Probation Officer has been instructed to make his own determinations, without regard to what the Government or defendant may recommend. Moreover, the Court makes the ultimate ruling after hearing the evidence, and is not likely to be unduly persuaded by the mere statement of a prosecutor or defense counsel that cooperation has, or has not, been extended. It is the duty of the Court to make (1) a finding as to the allegation [in this case cooperation or lack of same], or (2) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing.

In the proceedings on July 9-10, 1990, the Court will take judicial notice of the correctness of the transcription of the proceedings of May 8, 1990, unless counsel causes the appearance of the court reporter for questioning. The Court will also

take judicial notice of the plea agreement and written plea of guilty submitted at the hearing on May 8, 1990.

If the Court concludes the hearing on defendant's motion to withdraw his pleas of guilty, and if the Court denies said motion, the Court will proceed to sentence the defendant on Tuesday, July 10, 1990, at approximately 9:30 o'clock, a.m.

_____

Senior United States District Judge
(Under Designation)

At Norfolk, Virginia
July 3, 1990

AFFIDAVIT

STATE OF WEST VIRGINIA,
COUNTY OF MONONGALIA, to-wit:

Forest J. Bowman, being duly sworn, does depose and say:

1. That he is a lawyer, an active member of The West Virginia State Bar, and has served as a member of the faculty of the West Virginia University College of Law since August, 1979, first as an Associate Professor of Law (from 1979 through July 1983), then as a Professor of Law (from August 1983 through November 1990), and since December 1, 1990, as the Hale J. Posten Professor of Law;

2. That during most of his service on the faculty of the College of Law he has taught a semester-long course in Professional Responsibility;

3. That from the fall of 1979 through the spring of 1985, and again from the summer of 1986 through the spring of 1991, he served as a member of the Committee on Legal Ethics of The West Virginia State Bar, the committee which is charged by the By-Laws of The West Virginia State Bar with making investigations of ethics complaints against West Virginia lawyers, holding hearings thereon, and making findings and recommendations thereon;

4. That from the summer of 1986 through the spring of 1991 he served as Vice Chair of the Committee on Legal Ethics of The West Virginia State Bar and Chair of the Investigative Panel of the Committee, the panel of the Committee charged with determining whether good cause exists for the setting of a formal hearing on a legal ethics matter;

5. That for the past six years he has conducted Legal Ethics

seminars for lawyers in Alabama, Alaska, Colorado, Connecticut, Florida, Georgia, Indiana, Iowa, Minnesota, New Mexico, Ohio, Pennsylvania, and West Virginia, the seminars being directed at common ethics problems facing members of the practicing bar, including, but not limited to, the problem raised when a lawyer is likely to be a necessary witness for a client;

6. That during 1990 and 1991 he conducted Lawyer Professionalism seminars for lawyers in Georgia, Nebraska, Ohio, and West Virginia, which seminars contained specific discussion of the topic of conflicts of interest;

7. That over the past five years he has been engaged as an expert witness in thirty-two cases involving allegations of violations of lawyers' ethic codes and/or claims of lawyer malpractice in the states of Arizona, Connecticut, Georgia, Maryland, New Mexico, New York, North Dakota, Ohio, Pennsylvania, Virginia, and West Virginia;

8. That the information contained in his curriculum vitae is, to the best of his knowledge true and accurate;

9. That he has read the following documents in the case of **United States v. Arch A. Moore, Jr.,** Civil No. 2:91-0797 (Criminal No. 2:90-00078):

i) Grand Jury Indictment dated April 10, 1989;

ii) Plea Agreement signed by Mr. Moore on April 12, 1990;

iii) Arraignment Proceedings of May 8, 1990;

iv) Transcript of proceedings in the hearing of the Motion to Withdraw the Guilty Pleas before Hon. Walter E. Hoffman, July 9, 1990;

v) Arch A. Moore, Jr.'s Motion to Vacate Conviction and

Sentence pursuant to 28 U.S.C. § 2255 filed July 31, 1991, and memorandum of Law in Support; and

vi) Supplemental Memorandum in Support of Motion to Vacate Sentence filed Monday, October 21, 1991;

10. That he is of the opinion that Mr. Moore's counsel, William G. Hundley, was in the words of Rule 3.7 of the West Virginia Rules of Professional Conduct, "likely to be a necessary witness" for his client in Mr. Moore's effort to withdraw his guilty pleas in the above-styled case;

11. That none of the exceptions to Rule 3.7 of the West Virginia Rules of Professional Conduct which would permit a lawyer to act as advocate at a trial for a client while testifying on behalf of that client at that trial were applicable to the efforts of Arch A. Moore, Jr., to withdraw his guilty pleas;

12. That the failure of William G. Hundley to withdraw as counsel for Arch A. Moore, Jr., and testify as a witness as to the background of Mr. Moore's entry of pleas of guilty in the above-styled case is a clear violation of rule 3.7 of the West Virginia Rules of Professional Conduct.

/s/ Forest J. Bowman

Taken, subscribed, and sworn to before me, a Notary Public in and for Monongalia County, West Virginia, this the 7th day of November, 1991, as witness my signature and official seal.

/s/ Joyce E. Hawkins
Notary Public in and for
Monongalia County, W.Va.

My commission expires: July 29, 1997.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,
Plaintiff,
VS.
ARCH A. MOORE, JR.,
Defendant.
CRIMINAL ACTION NO.
2:90-00078

Proceedings had in the hearing of the MOTION TO WITHDRAW THE GUILTY PLEAS before Honorable Walter E. Hoffman, Judge, on Monday, July 9, 1990, at Charleston, West Virginia.

MR. HUNDLEY: That's right. I am not disagreeing with your Honor on that.

THE COURT: Why aren't you willing to tell me if you want to complain, if you want to complain on June the 9th - or July the 9th, why don't you complain on May the 8th?

MR. HUNDLEY: Your Honor, that's why I think its very important for the Court to hear Mr. Moore. I, William G. Hundley, counsel, I never had any difficulty with the plea. I recommended the plea very strongly to my client. I thought it was very, very much in his best interest to accept this plea. I think where I was at fault is I substituted my judgment of the Government's evidence for my client's evidence. My client is the one that was never happy with the plea.

THE COURT: Did your client tell you before May 8th that he insisted on pleading not guilty?

MR. HUNDLEY: Not that, your Honor, but that he always had serious, serious reservations about Counts 1, 2, 3 and 4, not the obstruction count.